UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

JULIO PORRES, Petitioner, ERNESTO CALVILLO, Petitioner, JOHN LOPEZ, Petitioner, ARAKELIAN ENTERPRISES, INC. DBA ATHENS SERVICES, Employer, and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 396, Union.	NLRB Case No. 31-RD-223309.

EMPLOYER ARAKELIAN ENTERPRISES, INC.'S REQUEST FOR EXTRAORDINARY RELIEF AND REVIEW OF REGIONAL DIRECTOR'S DECISION TO BLOCK RD PETITION

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Pursuant to Section 102.67(c), 102.67(j), 102.71 of the Board's Rules and Regulations, Respondent Arakelian Enterprises, Inc. d/b/a Athens Services ("Athens"), by its attorneys Epstein Becker Green, hereby submits this Request for Extraordinary Relief and Request for Review of Regional Director Mori Rubin's ("RD 31") decision to continue block and/or fail to process a decertification petition which raises valid questions concerning representation. **Case 31-RD-223309 ("Pacoima Petition") has been blocked for <u>595 days and counting</u>.** Specifically, on February 19, 2020, RD 31 notified the parties that she would continue the block of this petition, without providing any analysis, even though an administrative law judge ("ALJ") overwhelmingly found in Athens favor on the Union's blocking charges, dismissed all but three minor, insignificant allegations at the location at issue in the Pacoima Petition, and expressly found no union animus at any of the locations.

The Board should grant this request for review as there is a substantial question of law and policy raised because of a departure from officially reported Board precedent on employee free choice and the actions that can impact free choice, and because the Regional Director's action is, on its face, arbitrary and capricious. Board's Rules and Regulations 102.71(b)(1)(ii), (3).

I. <u>ISSUES PRESENTED.</u>

1. Should the block in NLRB Case 31-RD-223309 be lifted and the processing of the petition resumed?

II. <u>INTRODUCTION.</u>

> ***The Act's provisions "manifest a consistent and powerful concern with the expeditious resolution of questions concerning representation, as has been recognized in Supreme Court opinions and in the relevant legislative history."***

Representation—Case Procedures, 79 Fed. Reg. 240, 74308, at 74422 (Dec. 15, 2014).

> ***While the Act does not expressly state "elections should be held as early as is practical . . . . its very structure and relevant provisions demonstrate consistent and repeated support for that goal."***

79 Fed. Reg. at 74422 (internal brackets and quotations omitted).

THE EMPLOYEES AT ISSUE HERE HAVE BEEN DEPRIVED OF THEIR RIGHT TO VOTE FOR 595 DAYS AND COUNTING. The Board should order the Regional Director to immediately lift the Union's tactical block of their decertification petition and conduct an election as expeditiously as possible.

The blocking charge policy is an administrative invention borne out of the desire to protect employees' freedom of choice. However, what may have begun as a well-intentioned policy to guard against unlawful interference with employees' free choice has morphed into a weapon predominantly, if not exclusively, wielded by unions to deny the rights of employees who seek to reject their representation. This policy has become a procedural vice-grip subject to transparent tactical deployment by unions bent on retaining dominion over employees despite their minority status, and it does violence to the most fundamental purpose of the Act – protecting employees' freedom to choose or reject union representation.

This case perfectly illustrates the ills of the blocking charge policy. The employees here ***never*** voted on representation. Rather, representational status was conferred on the International Brotherhood of Teamsters, Local 396 ("Union") through card checks[1] provided for by a Labor Peace Agreement ("LPA") the City of Los Angeles imposed upon Athens under the threat of the loss of millions of dollars of existing business. Not surprisingly, the Union would not agree to the LPA unless Athens' waived its Section 8(c) and 9(c) rights and committed to complete neutrality

[1] Card checks are notoriously unreliable indicators of employee free chose and are widely recorded as an inferior method to test majority support. *See Dana Corp.*, 351 NLRB 434, 438-440 (2007) (overruled in part).

on Union matters.[2] Given that resisting this compelled waiver of rights would result in Athens losing millions of dollars in existing business, Athens had no choice but to submit to the Union's demands. Thus, consistent with its contractual obligations, Athens did not express an opinion on unionization during the Union's organizing drive (or since), and following the card check, dutifully recognized the Union as the exclusive representative of three separate bargaining units at its Peoria, Pacoima, and Torrance yards (collectively "LA Yards").

However, on **July 6, 2018**, employees at each represented yard filed petitions seeking to decertify the Union (collectively "RD Petitions"). The Union quickly moved to block these petitions by filing a boilerplate unfair labor practice charge against Athens and, based solely on the Union's unproven allegations, the Regional Director of Region 31 blocked all three petitions and commenced an investigation. The Union then proceeded to brazenly manipulate and abuse the blocking charge policy by intentionally delaying its presentation of evidence and filing subsequent charges strategically timed to prolong the Region's investigation and prevent expeditious resolution of these charge. Because of these tactics, it took the Region ***ten months*** to issue the operative complaint in this matter. The Union then delayed the hearing.

Following a 10-day hearing and subsequent briefing on the Union's blocking charges, Administrative Law Judge Jeffrey Wedekind ("Judge Wedekind" or "ALJ Wedekind" or "ALJ") issued a decision **on December 30, 2019,** *a full 18 months after employees filed the RD Petitions,* that essentially completely exonerated Athens ("ALJ Decision"). A Copy of the ALJ Decision is attached as Exhibit 1. Judge Wedekind dismissed 9 out of 12 allegations, including all of the

[2] Notably, the General Counsel has indicated that recognition obtained under such questionable conditions may be invalid under the National Labor Relations Act. *See* November 20, 2019 Letter from General Counsel Peter Bar Robb Re *Embassy Suites by Hilton, Seattle Downtown Pioneer Square*, NLRB Case No. 19-CA-227623 and *Unite Here! Local 8 (Embassy Suites by Hilton, Seattle Downtown Pioneer Square)*, NLRB Case No. 19-CB-227622.

discriminatory discipline/discharge allegations, and two of the three Athens locations were *fully cleared* of any wrongdoing. Of the three allegations Judge Wedekind sustained, they only involved the Pacoima yard, but he specifically found these were "unintentional," purely technical violations related to a few incidents that occurred *after* the RD petitions had been filed. Most importantly, the ALJ found there was absolutely no evidence of union animus, and Athens would not be required to rescind or reverse any of its decisions or actions.

Despite the ALJ's overwhelmingly favorable and vindicating decision, RD 31 has decided to continue and extend the **20-month block of the Pacoima petition** through the pendency of the exceptions appeals. There is simply no justification to continue this already obscenely long deprivation of the Pacoima employees' most fundamental rights under the Act, and RD 31's decision to do so is plainly an abuse of discretion. As the ALJ aptly found, Athens took no actions which in any way influenced the RD Petitions or employees' free choice, and under prevailing Board law regarding employee free choice, the circumstances of the allegations could not possibly affect employee free choice in an election conducted over a year and a half after the events underlying these allegations. In fact, the Region itself acknowledged that even if all of the Union's dismissed allegations had been found valid, they would not be sufficient to dismiss the petitions. Moreover, in deciding to further prolong the employees' extreme wait, RD 31's decision was utterly and completely devoid of any analysis or explanation of how she could possibly reach the conclusory belief that the minor unintentional violations as well as the dismissed allegations subject to exceptions would have the tendency to interfere with employee free choice – especially when all allegations are over a year and a half old. Consequently, there can be no justification for further delaying the exercise of these employees' fundamental rights for untold additional months or years while this case winds its way through the Board's appeal processes.

III. FACTUAL SUMMARY AND PROCEDURAL HISTORY.

A. Athens' Business and History.

Athens has been providing waste collection and recycling services in Southern California for over 60 years. Founded in 1957, Athens began as a small family-run business with one truck in the Athens District of Los Angeles. Athens is still a family-run company today, but it now employs nearly 1,600 employee's companywide and has grown into one of the largest independent (non-national) waste collection companies in the Los Angeles area with a significant percentage of the City of Los Angeles ("City") market share.

B. The Los Angeles Franchise and the Labor Peace Agreement.

Waste collection in the City had historically been a competitive open market in which consumers could contract with any hauler they chose to service their waste collection needs. This changed, however, on May 28, 2014, when the City implemented the Franchises for the Collection, Transportation and Processing of Commercial and Multifamily Solid Waste Ordinance ("Franchise Ordinance") following extensive support and lobbying efforts by the Union. *See* Los Angeles Municipal Code §§ 66.03 *et seq*. The Franchise Ordinance divided the City into 11 waste-hauling zones, and after a bidding process, the City awarded exclusive hauling rights in each zone to seven different trash haulers. This constituted a significant threat to Athens' business and market share.

To qualify for a franchise, all non-union trash haulers had to enter into a "labor peace agreement" with any union that seeks to represent its employees (without any showing of interest). *See* Los Angeles Municipal Code §§ 66.03 *et seq*. Thus, after the Union made such a request, Athens entered into the LPA with it on June 5, 2015. Thereafter, the City awarded Athens three

different franchise zones enabling it to keep roughly the same amount of business it had before the Union-supported change in law. The work for the City franchise contracts is being performed out of the three Athens LA Yards.

In order for Athens to obtain the legally required LPA, the Union insisted on access to the LA Yards and a card check provision, which would compel Athens to recognize the Union as its employees' bargaining representative without a secret-ballot election if the Union obtained signed authorization cards from at least 50 percent of the employees at any LA Yard. The LPA also contractually required Athens to waive its Section 8(c) rights and remain neutral with respect to whether employees should unionize.

Again, Athens would not have been able to continue doing business in Los Angeles and would have lost millions of dollars of business had it not agreed to enter the LPA.

C. Athens Thoroughly Trained Its Managers, Supervisors, and Employees on the LPA's Neutrality Mandate and Employees' Right to Freely Choose Representation.

Neutrality was a key aspect to Athens' ability to maintain its City contracts, which represented a significant share of its business, and any neutrality violation could jeopardize Athens' contracts. To protect its financial interests and ensure strict compliance with the neutrality mandate, Athens embarked on an extensive training campaign to educate its managers, supervisors, and employees on Athens' neutrality commitment. More specifically, Athens trained its managers and supervisors on what they could and could not do and say with respect to Union matters, and it educated employees on their rights to choose representation and Athens' strictly neutral stance.

D. The Union Submits Cards for Card Checks.

On February 14, 2017, Local 396 notified Athens of its intent to organize the employees at the LA Yards. Throughout the organizing campaign, Athens provided the Union with access to its yards and strictly complied with its neutrality commitment. Seven months later, on September 6, 2017, the Union requested recognition and, following a card check, Athens per the LPA recognized the Union as the exclusive bargaining representative of the three bargaining units on September 28, 2017.[3]

E. Employees Complain About Card Check Recognition.

Shortly after voluntary recognition, managers and supervisors at the LA Yards began receiving alarming reports from employees. Many employees lamented that they were deceived or coerced by the Union's solicitation tactics and they did not want to be represented by the Union. Some employees reported that the Union affirmatively misrepresented the impact of signing an authorization card and they did not understand they were authorizing the Union to act as their exclusive representative by signing the card, while others reported that the Union used high pressure tactics to coerce them into signing the card. Despite these recurring and disconcerting reports, Athens' managers and supervisors adhered to the LPA's neutrality mandate and invariably responded that Athens must remain neutral and cannot advise employees on how to redress their grievances.

[3] Prior to this date, none of Athens' employees had been previously represented by any union – with this recognition, approximately 400 of the roughly 1,600 Athens employees became unionized. As of the date of the initial petitions there were 270 employees in the Pacoima Unit, 16 employees in the Peoria Street Unit and 95 employees in the Torrance Unit.

F. Athens and the Union Bargain For An Initial Collective Bargaining Contract.

After the card checks, and following numerous informal and preparatory communications and discussions, the parties conducted their first in-person bargaining session on November 30, 2017. From November 30, 2017 to July 6, 2018, the parties held 15 full-day, in-person bargaining sessions, exchanging numerous proposals and reaching tentative agreements on many articles. After the employees filed their decertification petitions, Athens continued to remain neutral and bargain in good faith with the Union. In fact, since July 6, 2018, the parties held three more bargaining sessions, bringing the total to 18. However, at the last bargaining session, on November 27, 2018, the Union declared impasse and refused to negotiate further.

G. Employees at Each LA Yard File a Petition Seeking a Decertification Election.

Nine months after voluntary recognition, employees in each of the three separate bargaining units initiated decertification proceedings. On July 6, 2018, Ernesto Calvillo filed the Pacoima petition in 31-RD-223309 to decertify the Union as the exclusive representative of the Pacoima Unit. That same day, Julio Porres filed a petition in 31-RD-223335 to decertify the Union as the exclusive bargaining representative of the Peoria Unit ("Peoria Petition"), and John Lopez filed a petition in 31-RD-223318 to decertify the Union as the exclusive bargaining representative of the Torrance Unit ("Torrance Petition"). RD 31 promptly started processing the petitions and scheduled a Representation Hearing.

H. The Union Files Tactical Blocking Charges Strategically Timed to Delay the Processing of each of the RD Petitions.

Over the course of the five years, from the imposition of the LPA to the filing of the RD Petitions, the Union did not file a single unfair labor practice charge or arbitration claim[4] against Athens. To the contrary, the parties bargained hard in good faith for an initial contract – and were in fact still engaged in those negotiations at the time the RD Petitions were filed.

Yet, just eleven days after RD Petitions had been filed, the Union filed blocking charges claiming Athens had waged an anti-union campaign against the Union that undermined its majority support. Then, just as the Region was about to conclude its investigation and lift the block at the Peoria Yard, the Union filed a new blocking charge targeting just the Peoria Yard. Tellingly, the new allegation raised by the Union occurred during the same time period and involved the same employee as the initial Peoria Yard blocking charge. The Union could have easily raised this allegation when it filed its initial blocking charge four months ago, but it obviously sat on the allegation and was waiting to raise it when it would further delay the processing of the RD Petitions.

As detailed below, this pattern of raising stale allegations that allegedly occurred at the same time as the initial blocking charges just as the Region was set to wrap its investigation continued for eight months and is powerful, concrete evidence of the Union's abuse of the blocking charge policy.

[4] Under the LPA, if the Union believes Athens has violated the provisions of the LPA, for example, by interfering with employees' union activities or violating the neutrality provision, the Union can file for expedited binding arbitration.

1. The Union's First Blocking Charge.

About a week after the RD Petitions were filed, on July 13, 2018, the Union filed its first of many unfair labor practice charges seeking to block the RD Petitions.[5] Pursuant to the blocking charge policy, RD 31 granted the Union's request to block the petitions based on an undisclosed offer of proof and initiated an investigation.

Although blocking charge investigations are a priority under Board rules, several weeks passed without any communication from the Region. Accordingly, on July 26, 2018, Athens contacted the Region to inquire about the unreasonable delay. The Region acknowledged the investigation was taking longer than expected, but despite its efforts to push the Union, the Union still had not submitted all its evidence. Undoubtedly as a result of the Union's dilatory tactics, the Region was unable to provide a detailed explanation of the Union's allegations or request a position statement until ***four weeks after the RD Petitions were filed***.

2. Union Files a Second Blocking Charge After It Learns the Region Intended to Unblock the Peoria Petition.

The Region ultimately determined that the single allegation blocking the Peoria Petition had no merit, meaning the Peoria Petition would be unblocked and processed. Upon learning this, the Union filed a Second Blocking Charge aimed solely at the Peoria petition. Notably, the allegations in the Second Blocking Charge occurred shortly after the allegation in the First Blocking Charge and involved the same employee as the allegation in the First Blocking Charge,

[5] As used herein, "First Blocking Charge" shall refer to the unfair labor practice charge filed in NLRB Case 31-CA-223801 on July 13, 2018; the "Amended First Blocking Charge" shall refer to the amended unfair labor practice charge filed in NLRB Case 31-CA-223801 on October 31, 2018; the "Second Amended First Blocking Charge" shall refer to the unfair labor practice charge filed in NLRB Case 31-CA-223801 on December 10, 2018; the "Second Blocking Charge" shall refer to the unfair labor practice charge filed in NLRB Case 31-CA-226550 on August 22, 2018; the "Third Blocking Charge" shall refer to the unfair labor practice charge filed in NLRB Case 31-CA-230392 on October 31, 2018; the "Fourth Blocking Charge" shall refer to the unfair labor practice charge filed in NLRB Case 31-CA-232590 on December 10, 2018; and the "Fifth Blocking Charge" shall refer to the unfair labor practice charge in NLRB Case 31-CA-237885 on March 14, 2018.

and most notably, ***occurred three months <u>prior</u> to the filing of the Peoria petition***. These allegations could have been easily been alleged in and investigated with the First Blocking Charge, but the Union sat on the claim (which was found to have no merit at hearing) until it could be used to delay the processing of the RD Petitions even longer.

And the Union's dilatory tactics had the desired effect – the Region suspended its processing of the other blocking charges that it had already fully investigated (even though they involved different yards and separate RD Petitions) while it conducted its investigation into the Second Blocking Charge.

3. <u>The Union Amends Its First Blocking Charge and Files a Third Blocking Charge.</u>

On October 24, 2018, the Region informed the parties that it would soon wrap its investigation of the pending blocking charges. The Union, though, prevented this outcome by deploying the same tactical procedural maneuver it did before – it filed an Amended First Blocking Charge and a Third Blocking Charge on October 31, 2018. Like the first time the Union pulled this stunt, the "new" allegations in the Charges occurred at the same time as or before the allegations in the First and Second Blocking Charges and could have easily been alleged and investigated months earlier when the Union filed the First Blocking Charge. Yet, the Region acquiesced in the Union's transparent tactical maneuvers and stopped processing the allegations it had already investigated while it investigated these new allegations. By this time, the RD Petitions had already been pending for four months.

4. <u>The Union Files a Second Amended First Blocking Charge and a Fourth Blocking Charge.</u>

On December 10, 2018, the Union filed a Second Amended First Blocking Charge and a new Fourth Blocking Charge. Neither Charge alleged new allegations. Rather, like the Charges

that proceeded it, both Charges concerned events that occurred months before and could have been raised and investigated five months ago when the Region was investigating the Union's initial blocking charge allegations. Nevertheless, over the protests of the employee petitioners, the Region continued the block while it investigated the new charges.

5. The Union Files a Fifth and Final Blocking Charge After the Region Issues a Complaint.

Eight months after the filing of the RD Petitions, RD 31 finally issued a consolidated complaint on the blocking charge allegations found to have merit and set a hearing for May 7, 2019. However, the Union deployed yet another dilatory scheme designed to prevent employees from voting in the petitioned-for decertification vote. About a month later, on March 14, 2019, the Union filed its fifth and final blocking charge. In seeming disregard for the rights of employees, and over Athens' protests, the Region took the hearing off-calendar while it investigated the Fifth Blocking Charge. While a complaint was issued on this last allegation, the ALJ dismissed it entirely and neither the Region nor the Union appealed.

I. The Region Issues the Operative Complaint.

Unfortunately for Athens employees, and despite the "priority" nature of blocking charge investigations, the Region took another two and a half months to complete its investigation into the Fifth Blocking Charge. On May 29, 2019, the Region issued the operative Second Consolidated Complaint in NLRB Cases 31-CA-223801, 31-CA-226550, 31-CA-0232590, 31-CA-237885 and set a hearing for August 6, 2019. Commencing August 6, 2019, ***over a full year after the petitions had been filed***, the parties conducted a 10-day hearing on the Union's Blocking Charges.

J. The ALJ Dismisses Most of the Allegations and Finds No Union Animus. [6]

Judge Wedekind's written decision was nothing short of a complete vindication for Athens. Two of the Athens locations – Peoria and Torrance – were *fully cleared*, and all of the discriminatory discipline/discharge allegations *at all three yards* were dismissed. Although Judge Wedekind sustained three minor allegations at the Pacoima Yard related to two distinct, isolated post-petition dates, he expressly noted these were "unintentional," technical violations based on a "misunderstanding" precipitated by the Union's own misconduct.

Most importantly, Judge Wedekind expressly noted that none of the allegations, either dismissed or sustained, were indicative of union animus. *See, e.g.*, Ex. 1, ALJ Decision, at 20 ("In sum, contrary to the General Counsel, there is insufficient evidence that the Company had animus against the employees' protected union activities…"); *see also, e.g.*, Ex. 1, ALJ Decision, at 49:30-33 ("Finally, there is no other substantial direct or circumstantial record evidence of bad faith or an intent to frustrate agreement. Contrary to the General Counsel, the evidence fails to establish that the Company engaged in a course of conduct at its yards designed to discourage pro-Union activity and interfere with their statutory rights.")(internal quotations and citations omitted).

What the record evidence also makes clear is that each allegation was a one-off, isolated incident involving a small group of employees with no evidence of dissemination to or impact on the wider bargaining unit, and they all occurred ***20* months ago and counting**. In fact, most of the allegations occurred after the filing of the RD Petitions and, therefore, could not infect the petitions themselves. Moreover, none of the allegations, either sustained or dismissed, are the type of charges that could detrimentally impact collective bargaining negotiations, and thus, could not

[6] This Request for Review only addresses the allegations that were either sustained by Judge Wedekind or appealed by the General Counsel or Union since those are the only allegations blocking the RD Petitions.

reasonably be deemed to undermine the efficacy of the Union in employees' eyes. Shortly after the ALJ's decision, Athens requested that RD 31 conduct elections and supply Athens with the necessary postings so that Athens could comply with the ALJ's decision. A copy of the request is attached as Exhibit 2.

Notably, the Counsel for the General Counsel ("General Counsel") excepted to four of the dismissed Pacoima allegations and accepted Judge Wedekind's findings on all the remaining allegations, while the Union excepted to one other Pacoima allegation.[7] However, most of the General Counsel's and Union's exceptions challenged Judge Wedekind's credibility determinations, and as detailed below, all of these exceptions have only a remote possibility, at best, of being sustained by the Board on appeal.

Irrespective of the merits of such claims, these types of claims cannot possibly impair employee free choice in an election held **a year and a half after they occurred**, and they certainly cannot justify denying employees their fundamental right to choose representation for the **months or years longer** it will take for these appeals to conclude. However, what does impact employee free choice is the Union's and the Region's over **595 day delay** of employees' right to choose their own status in a Board-supervised, secret-ballot election.

K. RD 31 Decides to Continue Blocking the Pacoima Petition Without Any Analysis.

On February 19, 2020, RD 31, decided to continue the block of the Pacoima Petition and deprive the Pacoima employees' of the right to vote through the pendency of the exceptions. RD 31's decision did not contain any analysis but was simply a conclusory, three sentence statement:

[7] In an effort to delay the petitioned-for elections at Torrance and Peoria even further, the Union also excepted to the Torrance and Peoria allegations. As noted, this delay effort was properly rebuffed by RD 31.

> With respect to the Pacoima bargaining unit, the Director believes the conduct underlying the allegations found meritorious by the Administrative Law Judge, together with the conduct underlying the allegations that are the basis for exceptions filed with the Board, is significant and that this unremedied conduct would have a tendency to interfere with employee free choice in an election. Therefore, the Regional Director has concluded that no exception to the blocking policy applies and the petition for the Pacoima unit will remain blocked until the Board issues its decision regarding the exceptions relating to the Pacoima bargaining unit. The Director will reevaluate the status of the blocked petition at that time.

RD 31 Email February 19, 2020. A copy of RD 31's determination is attached as Exhibit 3.

As RD 31's determination clearing indicated, she correctly concluded the three minor, sustained allegations are not enough by themselves to support the continued blocking of the Pacoima Petition. However, she abused her discretion, and departed from officially reported Board precedent on employee free choice, when she decided that these sustained allegations coupled with the excepted-to allegations could impact employee free choice in an election conducted today. Board's Rules and Regulations, 102.71(b)(1)(ii). Accordingly, RD 31's decision raises a substantial question of law and policy in that it represents a dramatic departure from officially reported Board precedent.

Moreover, RD 31's decision to continue the block is, on its face, is arbitrary and capricious. Board's Rules and Regulations 102.71(b)(3). Not only is her decision wholly unsupported under Board law, but she gave absolutely no justification or reasoning for her decision, which will have the tragic effect of delaying the Pacoima Petition for months or even years longer. Accordingly, the Board should grant Athens' Request for Review and order RD 31 to lift the block and expeditiously conduct an election.

IV. ANALYSIS.

RD 31's refusal to release the block of the Pacoima RD Petition is an abuse of discretion and must be reversed. The Board's current "blocking charge policy is premised solely on the Agency's intention to protect the free choice of employees in the election process." NLRB Casehandling Manual (Part Two) § 11730. Accordingly, where pending unresolved unfair labor practice charges would, if proven, have the tendency to interfere with election free choice, the representation petition may be blocked until those charges are resolved. If, on the other hand, employee free choice in an election is possible notwithstanding the pendency of unresolved unfair labor practice charges, the representation petitions should be processed. NLRB Casehandling Manual (Part Two) § 11731 ("There may be situations where…employees could under the circumstances, exercise their free choice in an election and that the R case should proceed notwithstanding the existence of a concurrent Type I or Type II unfair labor practice charge. In such circumstances, the regional director **should** deny the request to block.")(emphasis added).

Moreover, "[u]pon final disposition of the unfair labor practice charges, the petition that was held in abeyance will be activated and be processed in the normal manner." NLRB Outline of Law and Procedure in Representation Cases (June 2017), Section 10-800 (hereinafter "NLRB Outline of Law"); *see also* NLRB Casehandling Manual (Part Two) § 11734 ("Processing of a petition held in abeyance during the pendency of an unfair labor practice charge may be resumed upon the disposition of the charge.").[8]

[8] As noted below, that "Hail Mary" exceptions may be filed should not be relied on to further extend the 20-month block, as, especially under the circumstances, to do so would be a gross perversion of the already flawed and broken blocking charge policy. *See* Representation—Case Procedures: Election Bars; Proof of Majority Support in Constructive Industry Collective-Bargaining Relationships, 84 Fed. Reg. 155, 39930 (Aug. 12, 2019).

Finally, Athens submits that in any blocking charge and free choice analysis, the Board (and the Regions) should balance any potential impact the allegations may have (which must include the passage of time and likelihood of success) against the inherent negative impact on free choice delaying an election has and the violence that is done to employee rights by depriving them the core and fundamental ability to choose when properly petitioned for.

Here, as explained below, the three minor allegations sustained at the Pacoima Yard would not impair employee free choice, especially when balanced against the harm of considerable additional delay. Accordingly, the block on the Pacoima RD Petition must be released.

A. The Three Minor Violations Found At the Pacoima Yard Do Not Impact Employee Free Choice.

The only facility that had allegations sustained against it was the Pacoima facility. However, these sustained allegations are not enough to continue blocking the employees' exercise of their rights. In fact, the NLRB's Casehandling Manual lays out five exceptions to the current Blocking Charge Policy. NLRB Casehandling Manual (Part Two) § 11731. Exception 2, "Free Choice Possible Notwithstanding Charge", to the Blocking Charge Policy is as follows:

> There may be situations where, in the presence of a request to block (Secs. 11731.1(a)), the regional director is of the opinion that the employees could under the circumstances, exercise their free choice in an election and that the R case should proceed notwithstanding the existence of a concurrent Type I or Type II unfair labor practice case. In such circumstances, the regional director should deny the request to block.

Id. § 11731.2; *see also* NLRB Outline of Law ("(2) *Free Choice Possible Notwithstanding Charge* (CHM sec. 11731.2). This exception is available where—even in the presence of a request to block—employees could, under the circumstances, exercise their free choice despite the unfair labor practices.").

The three, minor violations sustained at the Pacoima Yard do not justify a continuation of the block of the Pacoima Petition because these violations do not impair employee free choice. To determine whether employee free choice is possible notwithstanding alleged or proven unfair labor practices, the Board considers several factors, including the number of violations, their severity, the extent of dissemination, the number of unit employees affected, the size of the bargaining unit, the temporal proximity to the election and whether the misconduct was isolated.[9] *Werthan Packaging, Inc.*, 345 NLRB 343 (2005)(finding that, in a bargaining unit of more than 200 voters, threatening one union supporter with job loss if she voted for the union and interrogating four others about their union sympathies did not affect election outcome because these were isolated incidents which were not disseminated to the wider unit); *PPG Aerospace Industries, Inc.*, 355 NLRB 103 (2010) (five 8(a)(1) violations occurring during the post-petition critical period did not affect the election results where, *inter alia*, "there is no evidence of dissemination," "the violations affected only 5 employees in a unit of approximately 474," and a majority of the violations "occurred several weeks before the election."); *Gold Shield Security and Investigations, Inc.*, 306 NLRB (20) (1992)(finding employer's unlawful instruction to employee not to talk to any union representative did not affect election results where the incident was isolated and there was no evidence of dissemination to the 60 other eligible voters); *Bon Appetit Management Co.*, 334 NLRB 1042, 1044 (2001) (employer's unlawful interrogation of and threat to a prounion employee did not affect the election results given, *inter alia*, the misconduct only affected one employee out of an approximately 200-member unit and was not disseminated to other unit members);

[9] The Board also considers the margin of victory or defeat in the election. Of course, that factor cannot be evaluated here because RD 31 has refused to hold an election for **20 months and counting**. However, the absence of data on this factor militates in favor of conducting an election and tallying the votes because it will further illuminate whether the alleged unfair labor practice charges impacted employee free choice.

Washington Fruit & Produce Co., 343 NLRB 1215 (2004)(employer's unlawful conduct did not affect the election results where it only directly involved 2 out of 300 bargaining unit employees, the incident occurred more than a week before the election, and there was no evidence of wide dissemination to the bargaining unit); *The National League of Professional Baseball Clubs*, 330 NLRB 670 (2000)(misconduct that occurred three months prior to the petitions being filed did not affect employee free choice),

As the record evidence and ALJ Wedekind's decision demonstrates, Athens' employees at the Pacoima facility are more than capable of exercising their free choice in an election despite the three sustained minor and technical allegations. All three of the allegations that Judge Wedekind sustained involved conduct that occurred ***after*** the filing of the decertification petitions. Additionally, this conduct occurred in July and August of 2018, over a year and a half ago, and most importantly, Judge Wedekind specifically found that these allegations did not involve union animus; rather, two of the allegations centered around an unfortunate misunderstanding that arose in the context of prounion employees and Union representatives yelling racial slurs at an African American Security Guard and the other allegation was directly caused by the Union's trespassing.

1. July 12, 2018 Pacoima Allegations Do Not Impact Employee Free Choice.

The first two sustained Pacoima allegations arose out of a single incident on July 12, 2018, and the record evidence proves that these violations could not impact employee free choice.

First, Judge Wedekind specifically found that these incidents occurred because of a misunderstanding, with no indication of union animus: "the evidence indicates that it was based, not on union animus, but on [a supervisor's] report of a verbal altercation between the union representatives and [a security guard], and on [the Shop Manager's] misunderstanding of [the

General Manager's] instructions about how to address it."[10] Ex 1., ALJ Decision, at 19. In fact, he stated that "there is no other apparent reason revealed by the record why [the Shop Manager] and [the Security Guard] would have taken the unusual and unprecedented actions they subsequently did that day." *Id.* at 10 n.22. It was simply a one-off, unfortunate mistake that occurred over a year and a half ago.[11]

Second, these events occurred **20 months ago** and were isolated, one-off occurrences that did not impact the larger bargaining unit. In fact, it is undisputed that only a few employees out of the more than 260 bargaining unit members were even exposed to or aware of this incident. Of the few that were, they were not intimidated, restrained, coerced or even influenced by it; much less could it be said to have impacted their free choice. In fact, they mocked and laughed at the instruction; demeaning and diminishing the Manager and Security Guard with such insolence that no witness to the incident could objectively believe it impacted free choice. Ex. 1, ALJ Decision, at 11:6-9, 20-23. This is not an argument or opinion – it is undisputed fact, as the witnesses at the hearing all testified they ignored it and did not take it seriously, and video evidence played at the

[10] As detailed in Judge Wedekind's decision, the Union had set up a tent on the sidewalk outside the Pacoima Yard where it was meeting with Athens employees. Ex. 1, ALJ Decision, at 10-11. A supervisor reported to the Shop Manager that he heard the Union representatives and Athens employees at the Union tent yelling racial slurs at the African American Security Guard. *Id.* The Shop Manager called the General Manager, who had already left for the day, but misunderstood what the General Manager said due to his heavy Spanish accent and a bad cell phone connection. *Id.* Specifically, the General Manager told the Shop Manager (who did not know the alleged offenders names because he did not supervise them) to take pictures of the employees' names badges on their uniforms so he could identify and talk to them later. *Id.* However, the Shop Manager thought the General Manager said employees are not allowed to speak to the Union in their uniform. *Id.* As a result, the Shop Manager erroneously instructed the Security Guard to inform employees they could not speak to the Union in their uniforms. *Id.*

[11] Notably, throughout the interactions on July 12, 2018, the Athens' agents handled themselves professionally while the Union representatives did quite the opposite. For example, when the Security Guard, albeit mistakenly, told the Union representatives that he was "just doing my job," the Union representatives responded by telling him to go tell the manager "to go fuck himself," and that "we said, 'shut the fuck up.'" Ex. 1, ALJ Decision, at 11:6-9, 23.

hearing corroborated this testimony. *Id.* Moreover, these events had no lasting impact on the employees who witnessed it, much less the larger bargaining unit, as the rule was immediately retracted and never enforced, and employees continued to speak to the Union in their uniforms without consequence after these events.[12] Ex. 1, ALJ Decision, at 13.

Finally, even if the isolated incident could have possibly been viewed as impacting employee free choice when they occurred in July 2018, certainly it would be patently unreasonably to presume that this mocked mistake, which occurred **589 days ago** could in any way impact free choice today. Indeed, the Board has held that events occurring just weeks before an election, under similar circumstances as the events at issue here, were too remote in time to impact employee free choice in an election, so events occurring over a year and a half before the election certainly could not impact employee free choice, especially given the lack of dissemination. *See Washington Fruit & Produce Co.*, supra, 343 NLRB 1215; *see also PPG Aerospace Industries, Inc.*, supra, 355 NLRB 103. Accordingly, these allegations cannot be used to justify a continued blocking of the employees' rights.

2. There is No Basis to Find the Effects Bargaining Allegation Currently Impacts Free Choice.

The third sustained allegation – the Effects Bargaining Allegation[13] – similarly could not reasonably effect employee free choice. As with the other sustained allegations, Judge Wedekind

[12] Pursuant to the LPA, both before and after the events underlying this allegation, Athens has provided the Union with regular access to its LA Yards, during which employees regularly speak to the Union in their uniforms during non-working time in non-working areas without consequence. Additionally, as noted, the Union regularly sets up a tent outside each of the LA Yards, and employees routinely speak to the Union at the tent in their uniforms during non-working areas without consequence.

[13] On August 2, 2018, Union agents, together with an employee of an Athens' competitor, trespassed onto Athens property after hours and met with employees in the training room, a non-work area, and a security guard recorded the Union's unauthorized presence and activities. Ex. 1, ALJ Decision, at 14-17. The record evidence, including a video of the incident, shows an Athens manager instructing the Union agents to leave and informing them they were trespassing, but the Union agents refused to comply and proceeded to force their way into the training room. The

specifically found that the incident was not indicative of union animus: "In sum, contrary to the General Counsel, there is insufficient evidence that the Company had animus against the employees' protected union activities or that those activities were a motivating factor in locking the training room and thereby prevent employees from continuing to take meal breaks there." Ex. 1, ALJ Decision, at 20:5-9. Rather, Judge Wedekind found Athens' actions to be entirely reasonable and appropriate given the Union's confrontational trespassing the night before, its blatant defiance of management's security directives and the fact that "the union representatives had repeatedly demonstrated by both their actions and words on August 2 that they were unlikely to stop meeting with the shop employees [in the training room] in the future simply because company managers or supervisors said they were not allowed to." Ex. 1, ALJ Decision, at 19:32-20:1-3.[14] The only fault that Judge Wedekind found in this incident was that Athens did not provide the Union with notice and an opportunity to bargain over the effects of that decision, which would have no impact on an employees' free choice in an election.

Notably, the evidence at the Hearing revealed that the effects at issue were relatively minor, with no employee losing pay or benefits, but rather, at worst, only having to readjust their meal break seating and with Athens providing additional and equally suitable seating options shortly after. Athens Post-Hearing Brief, at 128-29, 134-36, a copy of which is attached as Exhibit 4.

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record evidence also shows this incident occurred after hours, when a majority of the bargaining unit employees were gone for the day, and was not disseminated beyond the small group of employees who witnessed the recording. After this incident, Athens locked the training room to prevent similar unauthorized activity in this working area. Ex. 1, ALJ Decision, at 19:30-20:8.

[14] Once again, throughout the incident on August 2, Athens' management acted with professionalism despite the Union's trespass. Nonetheless, the Union organizer told Athens' management to "be ready" and "go fuck yourself." Ex. 1, ALJ Decision, at 16:5-6.

Perhaps most important, nothing about this minor effects issue could be viewed as negatively impacting the Union's role as the exclusive bargaining representative in light of the minor impact on employees and the much more public good faith first contract bargaining process that Athens undisputedly engaged in both before and after this minor issue. In fact, the employees have full knowledge that Athens has engaged in nearly 20 bargaining sessions; making scores of economic and non-economic concessions among the way, working in good faith towards an initial collective bargaining agreement – with the Union's insistence on depriving employees of their fundamental Section 7 right to choose (either through the absence of a union security requirement or through their requested representation election) being the main source of any frustration towards a full agreement. Finally, the expansive passage of time since this minor effects issue – **568 days** – certainty militates to the point of inconsequence any potential impact on free choice. Accordingly, this stale allegation cannot be used to justify a continued blocking of the employees' rights.

It is a patent abuse of discretion, and undermines the core purposes of the Act, for RD 31 to continue to block the Pacoima Petition after **20 months** for three minor infractions that occurred in July and August of 2018. None of these sustained allegations impacted the employees' free choice in the summer of 2018 and certainly do not impact their free choice now in February of 2020. Accordingly, the Board should order RD 31 to immediately release the block on 31-RD-223309.

B. The Pendency of Exceptions Do Not Justify a Continued Block of Employees' Rights.

The RD based her decision to continue the block for the Pacoima Petition on the assumed cumulative impact of dismissed allegations and the unlikely possibility that one or more allegations

may be sustained by the Board on appeal. *See* Exhibit 3. However, the mere fact that the General Counsel or the Union may appeal through exceptions Judge Wedekind's well-reasoned 51 page Decision is no excuse to continue to deprive employees of their right to an election beyond the **20 months** they have already waited, especially as there is no basis to find that any of these dismissed allegations (even if proven) would impact free choice, much less any reason to believe any such exceptions would be accepted by the Board.[15]

Importantly, all of the dismissed charges were rejected because they lack merit and the fact that they lack merit necessarily results in the conclusion that the block must be lifted. In reviewing the allegations themselves, due deference must be paid to the fact that Judge Wedekind resolutely found that the allegations lacked merit and must be dismissed after evaluating all of the evidence, collected over 10 full days of hearing, including the review of over 100 exhibits, and the opportunity for the Union to present any witnesses or evidence it wanted. As noted above, Judge Wedekind's decision – and possibly more important, the record facts – establish that there is no merit to the dismissed charges. Therefore, there is no basis for the Region to determine that any of those allegations could impact employee free choice.

Moreover, in order to respect the underlying purposes of the Act, the likelihood of the success of these exceptions must be considered. It cannot be enough that a union may levy meritless charges and then merely because exceptions are filed the union achieves its delay tactic and deprives employees of their rights for months, if not years, longer. To the contrary, the evaluation of exceptions must be a different calculous from decisions to continue to block an

[15] Equally important is the fact, as the Region has acknowledged, that even if proven the allegations would not result in the dismissal of the petitions as there is zero indication that the employee disaffection which prompted the petitions was in any way influenced by the allegations.

election. This is especially true here where the likelihood of success of the exceptions is limited at best.

Finally, a Board decision on the exceptions is at best months away and potentially years away. In evaluating impact on free choice, the Board should evaluate the negative impact that continued delay of the employees' requested right for a vote for additional months or even years beyond the 20 months they have already waited. Weighed against the highly speculative results of the exceptions, it should be clear that it is further delay that is the real threat to free choice and that these employees deserve the right to have their petitions processed now.

It is against this backdrop that the appropriateness of continued blocking of the election that the pending exceptions to the dismissed allegations must be viewed and assessed. As detailed below, most of the allegations were dismissed, at least in part if not entirely, on credibility determinations; determinations the Board rarely disturbs. Moreover, given the evidence and findings on the lack of union animus, the circumstances of the alleged violations, and Athens' good faith efforts, the circumstances fall far short of finding that employee free choice would be interfered with if the election was conducted prior to a Board ruling on the exceptions.

1. The ALJ Rejected Most of the Pacoima Yard Allegations.

a. Summary of Dismissed Pacoima Allegations.

i. The Garcia Allegation.

In this allegation, the General Counsel alleged that, in early 2018, Athens' General Manager threatened Csildo Garcia with termination if he did not sign the decertification petition. Judge Wedekind dismissed this allegation on credibility grounds, noting "there are several reasons to doubt Garcia's testimony," which "contained troubling inconsistencies." Ex. 1, ALJ Decision,

at 4-5. Garcia also testified that he did not tell any bargaining unit members about this event, and he was alone when it happened.

ii. The Maldonado Discipline Allegation.

In the first GC excepted-to dismissed Pacoima allegation, the General Counsel alleged Athens issued a verbal warning – the lowest level of discipline under Athens' policies – to Jose Maldonado because of his protected activity after he failed to show up for his shift on May 22, 2018. Ex. 1, ALJ Decision, at 5-8. Notably, it was undisputed that Maldonado in fact failed to show up to work on the day and question or that he failed to call in. The undisputed record evidence also showed that Athens issued the same level of discipline to the other four employees who also failed to show up to work the same day as Maldonado. The Union's only evidence of management's alleged animus toward Maldonado's protected activities was a single, uncorroborated and self-serving hearsay statement that Maldonado claimed his former supervisor made to him. However, Judge Wedekind found Maldonado was not a "particularly reliable witness" given that much of his testimony was directly contracted by a manager and a fellow bargaining unit employee, and there was absolutely no record evidence corroborating Maldonado's testimony about the supervisor's hearsay statement.

iii. The July Surveillance Allegation.

The second excepted-to dismissed Pacoima allegation involved a single statement made by a low-level supervisor to Maldonado on July 12, 2018. Ex. 1, ALJ Decision, at 9-10. The General Counsel contended the manager's alleged statement created the impression the supervisor was monitoring how long Maldonado spoke to the Union, but Maldonado himself contradicted this theory at the hearing, testifying that he thought the supervisor was merely reminding him to be off-the-clock when speaking to the Union, which of course is a perfectly lawful instruction. *Id.*

Moreover, the ALJ found the General Counsel's proffered interpretation of the statement "would make no reasonable sense under the circumstances." *Id.* Furthermore, according to Maldonado's testimony, this isolated alleged statement was purportedly made just to Maldonado allegedly in front of one other employee (who the General Counsel did not call as a witness at the hearing), and there is no other evidence these alleged events were disseminated to the larger bargaining unit. Thus, at most, only two employees knew about the statement allegedly made nearly two years ago.

iv. The August Surveillance Allegation.

The third excepted-to allegation involved an incident on August 2, 2018 where Union agents trespassed onto Athens property after hours and met with employees in the training room, a non-work area, and a security guard recorded the Union's unauthorized presence and activities. Ex. 1, ALJ Decision, at 14-17. The ALJ dismissed the allegation, finding Athens had a reasonable concern about trespassing, and therefore, was privileged to record the Union's misconduct. *Id.* The record evidence shows this incident occurred after hours, when a majority of the bargaining unit employees were gone for the day, and was not disseminated beyond the small group of employees who witnessed the recording. Ex. 4, Athens Post-Hearing Brief, at 117-21.

v. The Training Room Closure Allegation.

The fourth excepted-to dismissed Pacoima allegation was related to the August 2, 2018 Union trespassing. Specifically, Athens locked the training room to prevent similar unauthorized activity in this non-work area in the future. The General Counsel alleged Athens took this action in response to union activity. The ALJ dismissed the allegation because the record evidence proved Athens locked the training room in response to the Union's unprotected trespassing after the Union made clear it would not comply with management directives to stay out of that working area. Ex. 1, ALJ Decision, at 17-20. In so holding, the ALJ noted, "contrary to the General

Counsel, there is insufficient evidence that the Company had animus against the employees' protected union activities or that those activities were a motivating factor in locking the training room and thereby preventing employees from continuing to take meal breaks there." Ex. 1, ALJ Decision, at 20.

b. None of the Dismissed Pacoima Allegations, Even if Proven, Could Affect Employee Free Choice.

The General Counsel did not appeal one of the dismissed Pacoima 8(a)(1) allegations; only the Union did. The General Counsel did appeal the other four dismissed Pacoima allegations, but all dismissed Pacoima allegations lack any of the characteristics necessary to impair employee free choice.

First, all of the allegations concerned isolated incidents directly involving just a small number of employees, and there was no evidence of dissemination to the larger bargaining unit. Second, all of the events underlying these allegations occurred **over a year and a half ago or longer**, and only one allegation, the allegation related to the closure of the training room, could even conceivably have any lasting impact on the wider bargaining unit. Even then, at most, the only impact was that employees had to adjust their seating arrangements to the alternative but equally suitable seating Athens provided shortly after. Ex. 4, Athens Post-Hearing Brief, at 128-30, 134-36. Moreover, with respect to the single 8(a)(1) discipline charge, which involved the lowest level of discipline issued to Jose Maldonado after he undisputedly failed to show up to work without calling first, the undisputed evidence proves, after the discipline, Maldonado received a promotion with a significant pay raise since the alleged retaliatory discipline. Employees clearly would not think he had been discriminated against for his protected activities when he in fact received a substantial promotion even though, as Maldonado admits, his support for the Union did

not wane. Under these circumstances, none of the dismissed Pacoima allegations could possibly interfere with employee free choice in an election held today.

c. It is Highly Improbable That The Board Would Sustain the Pacoima Allegations.

With respect to the Garcia Allegation, Judge Wedekind dismissed this allegation on pure credibility grounds, finding "there are several reasons to doubt Garcia's testimony" and his testimony "contained troubling inconsistencies." Ex. 1, ALJ Decision, at 4:31-32, 4:39.

With respect to the July Surveillance Allegation, Maldonado himself testified, *contrary to the General Counsel's theory*, that he interpreted the statement as a lawful directive to be off-the-clock when speaking to the Union, not as an indication that Athens was surveilling his union activities. Second, the ALJ noted that the General Counsel's proffered interpretation of the statement "would make no reasonable sense under the circumstances." Ex. 1, ALJ Decision, at 9:27-28.

With respect to the Maldonado Discipline Allegation, there was no dispute that Maldonado did not show up on the day in question and that his failure to call in warranted discipline under Athens' attendance policies. The only dispute was whether Maldonado's discipline was motivated by union animus or discriminatory motive. The ALJ's decision that Maldonado's discipline was not unlawfully motivated was based on a well-supported credibility determination, in particular, that the Union's only evidence of animus was an uncorroborated hearsay statement made by a witness who "was not a particularly reliable witness." Ex. 1, ALJ Decision, at 7:12. Additionally, the undisputed record evidence shows Athens disciplined the other four employees who also failed to show up to work without calling that day, and the General Counsel presented absolutely no evidence that Maldonado was treated differently than these fellow bargaining unit members.

With respect to the Training Room Closure Allegation, Judge Wedekind determined, based on a review of all of the evidence and testimony after assessing witnesses' credibility, that Athens closed the training room in response to the Union's trespass and the Union's clear intent, manifested in both words and conduct, not to abide by management's directives regarding the training room. It is consistent with well-established Board law.

With respect to the August Surveillance Allegation, video hearing evidence unequivocally showed the Union trespassing onto Athens' property and Athens' managers asking them to leave, and it was this trespassing that precipitated the alleged surveillance. It is well-established, as Judge Wedekind found, that employers have a right to record unlawful activity such as trespassing.

Consequently, the exceptions to the dismissed Pacoima allegations cannot be the basis to continue blocking 31-RD-223309.

In sum, it is abundantly clear from Judge Wedekind's decision that at no time did Athens' employees at the Pacoima facility ever have their free choice in the election process hindered by Athens. In fact, the only entities who have hindered and continue to hinder the employees' free choice is the Region and the Union. Consequently, the Board should unblock the petition, allow for an efficient and speedy election, and tally the ballots immediately.

C. The Blocking Charges Have Continued for Far Longer Than Should Be Allowed.

As the Board has recently noted, "[t]he median number of days from petition to election from 2016 through 2018 was 23 days in unblocked cases. The median number of days from petition to election in the same period for blocked cases ranged from 122 to 144 days." Representation—Case Procedures: Election Bars; Proof of Majority Support in Constructive Industry Collective-Bargaining Relationships, 84 Fed. Reg. 155, 39930, at 39933 n.14 (Aug. 12,

2019) (hereinafter "Representation—Case Procedures"). This is concerning as the employee petition for the Pacoima facility has been blocked for **595 days and counting**. That means the petition has been blocked over a year longer than the already unacceptable median number of days for a blocked petition between 2016 and 2018. This is a tragic circumstance that needs to be immediately rectified, particularly given the evidence produced during the hearing and Judge Wedekind's decision.

The Board has realized this reoccurring problem and is set to address it with their new proposed rule on blocking charges:

> In a significant number of cases, the [blocking charge] policy denies employees the right to have their votes, in a Board-conducted election on questions concerning representation, "recorded accurately, efficiently, and speedily." In particular, statistical evidence over several decades of Board elections undisputedly shows that the blocking charge policy causes substantial delays in the conduct of elections in which employees seek the opportunity to freely express their choice with respect to whether they wish to continue being represented by their incumbent union.

Representation—Case Procedures, 84 Fed. Reg. 155, 39937 (Aug. 12, 2019) (quoting *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 331 (1946)).

The situation before us is the exact type of case that the Board was referencing. Athens' employees have been denied their right to have a Board-supervised election conducted efficiently and speedily because of substantial delays based on minor or rejected allegations – none of which affect employees' free choice. The employees at Athens have continuously sought the opportunity to freely express their choice with respect to whether they want to continue being represented by the Union.

The Union has responded to the employees' attempt to exercise their rights with vulgar behavior, racial slurs, unlawful trespass and the abuse of any and all mechanisms available to them

to delay or prevent the employees' expression of free choice. The Board should not allow itself to be an accessory to the Union's continued assault on these employees' most fundamental rights under the Act. Consequently, the Board should order RD 31 to unblock the petition, allow for an efficient and speedy election, and tally the ballots immediately so that this **595 (and counting) day** delay may finally come to an end.

D. The Board Should Not Continue to Allow the Union to Abuse This Process.

The Board should order RD 31 to remove the block on the Pacoima decertification petition and prevent the Union from further abusing this process. "[T]he [blocking charge] policy is not intended to be misused by a party as a tactic to delay the resolution of a question concerning representation raised by a petition." NLRB Casehandling Manual (Part Two) § 11730. The Union has made it extremely clear throughout this **20 month period** that they will continue to delay this process for as long as they possibly can. They strategically brought forward ULP charges at various times in order to continue to block the petitions, which finally resulted in a 10 day hearing. Now, despite Judge Wedekind's decision, the Union continues to seek to delay, with RD 31's assistance, the process at every stage and for untold additional months or years.

The employees' frustration at this continued delay is completely understandable and evident. During communications with the parties about whether the block should be continued, Julio Porres, the petitioner in 31-RD-223335[16], sent an email pleading to the Region to allow for a vote without any more delays:

> With all due respect to all parties involved, all of us here employed at Athens want to see this come to a conclusion as soon as possible, we don't want to see anymore delays please let us have a fair vote.

[16] 31-RD-223335 is regarding the Peoria yard, which, as stated above, in an effort to delay the petitioned-for election further at Peoria, the Union excepted to the Peoria allegations. As noted, this delay effort was properly rebuffed by RD 31.

A copy of the email is attached as Exhibit 5, the pertinent section is on page 2. The employees deserve to finally have their vote. The vote and the counting of the ballots should be done immediately, not after the posting period, not after the exceptions are filed, and not after whatever convoluted plan the Union puts forth to continue to delay this process.

Moreover, if the Union's past behavior is any indication of its future behavior, the Union no doubt has plans to continue this process and will do so. Not only is the Board critical of the blocking charges and the ability of unions to abuse this process, but various circuit courts have noted the controversial impact blocking charges have on employees' right to vote: "The adverse impact on employee RD petitions resulting from the Board's blocking charge policy, and the potential for abuse and manipulation of that policy by incumbent unions seeking to avoid a challenge to their representative status, have drawn criticism from courts of appeals on several occasions." Representation—Case Procedures, 84 Fed. Reg. 155, at 39931-39932 (Aug. 12, 2019) (citing Pacemaker Corp v. NLRB, 260 F.2d 880, 882 (7th Cir. 1958); *NLRB v. Minute Maid Corp.*, 283 F.2d 705, 710 (5th Cir. 1960); *NLRB v. Midtown Service Co.*, 425 F.2d 665, 672 (2d Cir. 1970); *Templeton v. Dixie Color Printing Co.*, 444 F.2d 1064, 1069 (5th Cir. 1971); *NLRB v. Hart Beverage Co.*, 445 F.2d 415, 420 (8th Cir. 1971)). The Union simply cannot be allowed to carry this farce any longer.

At this point, the waiting period for the Pacoima Petition, **595 days**, could almost be seen as comical if it was not tragically stripping Athens' employees of their right to vote on a

decertification petition filed in July of 2018. Accordingly, the Board should order RD 31 to unblock the petition, allow for an efficient and speedy election, and tally the ballots immediately.[17]

V. CONCLUSION.

As detailed above, the Pacoima Petition (31-RD-223309) should be unblocked, while the ALJ sustained three minor violations at the Pacoima Yard, none of these violations could reasonably affect free choice in an election occurring over a year and a half after the allegations occurred. Likewise, it is highly improbable that the Board will sustain the General Counsel's and Union's exceptions to the dismissed Pacoima allegations, but even if it did, such allegations could not reasonably impact employee free choice in an election occurring over a year and a half later. Thus, there is no justification to continue the block of the Pacoima Petition (31-RD-223309).

[17] In the event that the Board considers that, in lieu of continuing the block, the election could be scheduled and ballots merely impounded until the resolution of the exceptions, such an option should be firmly rejected for much of the same reasons articulated throughout this request for review. Impounding the ballots for untold months or years while the Union pursues exceptions and any additional machinations of delays it can conceive would be tantamount to continuing the block. The result would be essentially the same. The Union would be permitted to deny employees their requested vote while the Board considered the exceptions making it highly unlikely that the employees would be given the opportunity to vote within 2 or even 3 years of the date they originally petitioned the Board. The Union should not be able to stop votes from being cast *and* counted for longer than a Congressional term of office. Moreover, should the employees be told that an election is going to be scheduled and held but that the results are not going to be tallied for some months or even years in the future, the real impact on voter turnout and employee choice would far outweigh any hypothetical impact of the dismissed allegations. Consequently, delaying the counting of the ballots is just as destructive of the purposes and rights of the Act as continuing the already 20 month block. Accordingly, as stated thoroughly herein, the Board should order RD 31 to release the block, process the petition, schedule the election and immediately tally the ballots.

In sum, the Board should order RD 31 to lift the **595 day and counting** block of the petition in 31-RD-223309 and conduct an immediate election.

Dated: February 21, 2020

EPSTEIN BECKER & GREEN, P.C.

By: */s/ Adam C. Abrahms*

Adam C. Abrahms
Christina C. Rentz
Brock N. Olson

Attorneys for Respondent
ARAKELIAN ENTERPRISES, INC., d/b/a
ATHENS SERVICES

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My business address is 1925 Century Park East, Suite 500, Los Angeles, CA 90067-2506.

3. I served copies of the following documents *(specify the title of each document served)*:

EMPLOYER ARAKELIAN ENTERPRISES, INC.'S REQUEST FOR EXTRAORDINARY RELIEF AND REVIEW OF REGIONAL DIRECTOR'S DECISION TO BLOCK RD PETITIONS

4. I served the documents listed above in item 3 on the following persons at the addresses listed:

Mori Ruben **Nayla Wren** **National Labor Relations Board, Region 31** **11500 W. Olympic Blvd., Ste. 600** **Los Angeles, CA 90064** **T: (310) 307-7337 | F: (310) 235-7420** **E: Mori.Rubin@nlrb.gov** **Nayla.Wren@nlrb.gov**	***Counsel for the General Counsel***
Paul L. More **Attorneys at Law** **McCracken, Stemerman & Holsberry LLP** **595 Market Street, Suite 800** **San Francisco, CA 94105** **E: pmore@msh.law**	***Counsel for the International Brotherhood of Teamsters, Local 396***
Julio Porres **E: porresjulio73@gmail.com**	***Petitioner for 31-RD-223335***
John Lopez **E: johnblopez94@gmail.com**	***Petitioner for 31-RD-223318***
Ernesto Calvillo **E: pde667@hotmail.com**	***Petitioner for 31-RD-223309***

☒ **By e-mail or electronic transmission.** I caused the documents to be sent on the date shown below to the e-mail addresses of the persons listed in item 4. I did not receive within a reasonable time after the transmission any electronic message or other indication that the transmission was unsuccessful.

I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at Los Angeles, California.

6. I served the documents by the means described in item 5 on **February 21, 2020**.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

2/21/20	Stephanie Alvarez	*/s/ Stephanie Alvarez*
DATE	(TYPE OR PRINT NAME)	(SIGNATURE OF DECLARANT)

EXHIBIT 1

JD(SF)–45–19
Los Angeles, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

ARAKELIAN ENTERPRISES, INC.
D/B/A ATHENS SERVICES

and Cases 31–CA–223801
31–CA–226550
TEAMSTERS LOCAL 396 31–CA–232590
31–CA–237885

Amanda W. Laufer and Christine Flack, Esqs.,
for the General Counsel.
Adam C. Abrahms and Christina C. Rentz, Esqs. (Epstein, Becker, Green),
for the Respondent Company.
David L. Barber, Esq. (McCracken, Stemerman & Holsberry, LLP),
for the Charging Party Union.

DECISION

JEFFREY D. WEDEKIND, Administrative Law Judge. In May 2014, the City of Los Angeles decided to change the way commercial businesses and multifamily buildings had their trash collected. At the time, trash collection from such customers was an open market in which multiple companies competed and operated in all areas of the city. The City changed that by passing an ordinance dividing the city into eleven zones, each to be serviced exclusively by a single waste collection company under a franchise contract with the City.

Athens Services (the respondent company here) was one of numerous companies that sought a franchise contract with the City to service one or more of the zones. Athens was a nonunion company that had serviced the area under the open-market system, and it wanted to continue doing so under the new franchise system as its Los Angeles customers provided a substantial portion of its revenue. There was at least one significant obstacle, however. The city ordinance required that, in order to obtain a franchise contract, a company had to enter into a "labor peace agreement" (LPA) with any union that represented or sought to represent the company's employees wherein the union agreed to refrain from any picketing, work stoppages, or any other economic interference with the company's performance of collection services.[1]

Accordingly, to ensure compliance with this condition precedent, in 2015 Athens negotiated and executed such an agreement with Teamsters Local 396, a union that represented employees at Athens' competitors, including Republic Services and Waste Management. As required by the ordinance, the LPA provided that the Union would not authorize, encourage, participate in, or sanction any strike or other similar workplace action for any reason. It also

[1] See Ordinance No. 182986, Secs. 66.33.1 and 66.33.6. At the parties' request (Jt. Exh. 1 at 1 n. 1), judicial notice has been taken of the ordinance. A copy of both the ordinance and the ing municipal code sections can be found on the City's website at www.lacity.org.

contained numerous additional provisions that were not required by the ordinance but which the Union insisted be included in the LPA. For example, it provided that, if and when Athens and the City executed a franchise contract, Athens would take a neutral approach to unionization of its employees; that upon 24-hours notice up to three union representatives would be allowed access to nonwork areas during nonwork times for up to 32 hours each month to communicate with the employees; that the Union would also be provided with the employees' names, addresses and phone numbers; and that Athens would recognize the Union at each facility if an arbitrator or other person selected by the parties determined that it had obtained authorization cards from a majority of the employees at that facility.[2]

The City awarded the eleven franchise zones the following year, in late 2016. Athens was awarded three of the zones (North Central, West LA, and Harbor). One or more of the other eight zones were awarded to several competitors, including Republic Services and Waste Management. The franchises subsequently went into effect in July 2017, and the zones were rolled out by February 2018.[3]

In the meantime, in February 2017 Local 396 began organizing at three of the Company's facilities in Pacoima, Torrance, and Sun Valley. It eventually obtained authorization cards from a majority of the drivers, helpers, mechanics, welders, and other yard and shop workers at each facility in late September 2017. Consistent with the LPA, the Company therefore recognized the Union as the bargaining representative of those employees at each of the three facilities.[4]

The parties began bargaining for an initial collective-bargaining agreement covering each of the facilities a few months later. Over the following year, from late November 2017 through late November 2018, their respective bargaining teams met numerous times. However, the Union was unable to reach a contract with the Company, primarily due to significant disagreements over union security (compulsory or so-called "fair share" union dues and fees) and the major economic items (wages and medical and retirement benefits).[5]

During this same period, a number of employees began soliciting signatures to remove the Union as the bargaining representative at each of the facilities. On July 6, 2018, formal petitions for a "decertification" secret-ballot election at each of the three facilities were filed with the NLRB Regional Office. All three petitions—31-RD-223309 (Pacoima), 31-RD-223318 (Torrance), and 31-RD-223335 (Sun Valley)—indicated that the requisite number of employees to obtain an election at the respective facilities (30 percent or more) no longer wished to be represented by the Union.[6]

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[2] See Jt. Exhs. 1, 2; and Tr. 1548, 1994, 2232–2235. Section 66.33.6(c) of the city ordinance specifically stated that the ordinance did not require an employer to recognize a particular labor organization or enter into a collective-bargaining agreement establishing the substantive terms and conditions of employment; that it did not enact or express any generally applicable policy regarding labor/management relations or regulate those relations in any way; and that it did not provide a preference for any outcome in the determination of employee preference regarding union representation.

[3] Tr. 1075–1076, 1083–1086, 2115–2118, 2192–2193.

[4] Jt. Exhs. 1–7.

[5] See Jt. Exh. 1 and the more detailed discussion of the parties' contract negotiations infra.

[6] Jt. Exhs. 1, 52–54.

The Union filed the initial unfair labor practice (ULP) charge against the Company in this proceeding a week later, on July 13. It also filed another on August 22. As later amended, the charges alleged that the Company had engaged in various coercive and discriminatory antiunion conduct in violation of Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act at all three facilities prior to the July 2018 decertification petitions. At the Union's request, the petitions were therefore held in abeyance pending resolution of the charges pursuant to the Agency's longstanding "blocking charge" policy. Thus, no decertification election was held at any of the three facilities.[7]

The Union also subsequently filed two more ULP charges against the Company in December 2018 and March 2019. The December 2018 charge alleged that the Company took certain additional retaliatory and unilateral actions against prounion employees in August 2018 in violation of both Section 8(a)(3) and Section 8(a)(5) of the Act. The March 2019 charge, as later amended, alleged that the Company also engaged in bad-faith regressive bargaining in violation of Section 8(a)(5) by withdrawing previous contract proposals.

The Regional Director issued a consolidated complaint on all the foregoing 8(a)(1), (3), and (5) charges in May 2019. A hearing to address the complaint allegations and the Company's defenses was subsequently held over 10 days between August 6 and 19. The General Counsel and the Company thereafter filed posthearing briefs on September 23.[8]

As discussed below, a preponderance of the evidence establishes that the Company committed three of the alleged post-petition 8(a)(1) violations at the Pacoima facility (engaging in surveillance, creating the impression of surveillance, and promulgating an unlawful rule on July 12, 2018). The evidence also establishes that the Company violated 8(a)(5) by failing to provide the Union with notice and an opportunity to bargain over the effects of an August 3, 2018 unilateral change at that facility. However, the evidence fails to establish that the Company committed any of the alleged pre-petition 8(a)(1) violations or any of the alleged 8(a)(3) violations at the three facilities. The evidence also fails to establish that the Company engaged in bad-faith regressive bargaining in violation of 8(a)(5) by withdrawing previous contract proposals in March 2019.[9]

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[7] See *U.S. Coal & Coke Co.*, 3 NLRB 398 (1937); and Sec. 11730 of the NLRB's Casehandling Manuals (Parts 1 and 2).

[8] The Board's jurisdiction is uncontested and established by the record. Unless otherwise noted, the Company also does not dispute that the named individuals who allegedly committed the unfair labor practices were supervisors and/or acting as agents of the Company at all relevant times within the meaning of Section 2(11) and (13) of the Act.

[9] Specific citations to the transcript, exhibits, and briefs are included where appropriate to aid review and are not necessarily exclusive or exhaustive. In making credibility findings, all relevant and appropriate factors have been considered, including the demeanor and interests of the witnesses; whether their testimony is corroborated or consistent with the documentary evidence and/or the established or admitted facts; inherent probabilities; and reasonable inferences that may be drawn from the record as a whole. See, e.g., *Daikichi Sushi*, 335 NLRB 622, 623 (2001), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003); and *New Breed Leasing Corp. v. NLRB,* 111 F.3d 1460, 1465 (9th Cir.), cert. denied 522 U.S. 948 (1997). Careful consideration has also been given to the way the testimony was adduced by counsel. For example, in general, has been afforded testimony of nonadverse witnesses about disputed matters that was

I. ALLEGED 8(A)(1) AND 8(A)(3) VIOLATIONS

A. *Alleged Violations at Pacoima Facility*

The Pacoima facility (also called LA North or LANO) is the largest of the three facilities, with approximately 250 unit employees. The complaint alleges that the Company committed several 8(a)(3) and/or 8(a)(1) violations at that facility between March and August 2018.

1. Alleged March 2018 threat to discharge Csildo Garcia if he did not support the antiunion petition

Csildo Garcia has worked as a driver's helper at Athens since 2016. He testified that in March or April 2018 he was exiting the Pacoima facility to go home when he encountered Tomas Solis, the assistant general manager at the facility, just outside the door leading to the parking lot. Solis said he wanted Garcia to sign a piece of paper in his office. Garcia asked why, and Solis said it was so Garcia wouldn't "go into and join the Union." Garcia didn't know what Solis meant by this, but he asked Solis what would happen if he didn't sign the paper. Solis replied, "If you don't sign it, I'll take your neck," which Garcia understood to mean Solis would fire him. Garcia responded that he would wait to see if Solis did so and left without going to the office or signing the paper. (Tr. 38–41, 47, 50.)

Solis denied having any such encounter or conversation with Garcia or any other employee. He testified that he was trained to remain neutral as required by the LPA. (Tr. 1849–1850, 1858–1863, 1882−1885.) However, the General Counsel argues that Garcia is a more credible witness because he testified that he was not a member of the Union, knew little of it, and was "neither for it or against it" (Tr. 38), and because testifying against the Company was contrary to Garcia's pecuniary interest. Accordingly, the General Counsel contends that a preponderance of the evidence establishes that Solis threatened to discharge Garcia if he did not support the antiunion petition in violation of Section 8(a)(1) of the Act.

As indicated by the Company, however, there are several reasons to doubt Garcia's testimony. First, the record indicates that Garcia was not as uninformed and uninterested regarding the Union as he professed. Gilberto Lopez, an International Union organizer, testified that Garcia was "a regular" at the tent that the Union set up every Thursday on the public sidewalk outside the main gate to the facility throughout 2018, and that he always stopped to talk to the union representatives on his way home (Tr. 821). Further, Garcia admitted on cross-examination that the Union brought him to the hearing to testify (Tr. 45–46).

Second, Garcia's testimony about the incident contained troubling inconsistencies. For example, Garcia initially testified on direct examination that Solis did not respond when he said that he would wait to see if Solis took his neck (Tr. 40). However, Garcia subsequently testified

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adduced by counsel on direct examination through leading questions, particularly where there was no demonstrated or apparent need to refresh the witnesses' memory or rephrase their prior testimony to develop a full and clear record. See FRE 611(c); and *ODS Chauffeured* *tion*, 367 NLRB No. 87, slip op. at 1 (2019).

on cross that Solis responded that anybody who didn't sign was going to have their neck taken (Tr. 48–49).

Third, Garcia admitted that he never mentioned the incident to the Union or anyone else. When asked on cross-examination to explain this, Garcia testified that it was because there were other people standing around, suggesting that he thought they would inform the Union. (Tr. 43, 48, 55.) However, Garcia had previously testified on direct that he didn't know if anyone else was present during the conversation because he was paying attention to Solis (Tr. 40–41). Moreover, given how frequently Garcia spoke to the union representatives after his shift, it seems unlikely he would not have mentioned such a remarkable incident to them if it had actually happened.[10]

Accordingly, the allegation will be dismissed.

2. Alleged May 2018 retaliatory discipline of Jose Maldonado for a Saturday no-call/no-show

Jose Maldonado has worked at Athens for about 3 years. At the time of the relevant events, he was one of two tire mechanics at the Pacoima facility. The other tire mechanic was David Maldonado (no relation), who has worked at Athens for about 6 years. Jose was an early and open union supporter and was one of three employees at the facility who served on the union bargaining committee during the contract negotiations. David was not active in the Union. (Tr. 58–63, 107–109, 113–115, 246–248.)

Both Jose and David worked Monday through Friday every week. They both also initially worked every Saturday. However, in 2016, they asked the fleet manager, Mark Martorana, if they could rotate Saturdays as there was not enough weekend work for the both of them. Martorana agreed but said they had to make sure that one of them covered each Saturday. So after that they generally alternated Saturdays. The only time they both were required to work on a Saturday was following a holiday or if their shop supervisor asked them both to come in. (E. Exh. 1; Tr. 64, 113–116, 218–219, 247, 250–255, 316–323, 1742–1743, 1799.)

There was no written alternating Saturday schedule or other memorialization of this arrangement, however. Jose and David were both still listed on the formal Saturday schedule. They simply decided between themselves who would come in each Saturday. They would only inform their supervisor or foreman on Friday who was coming in if they changed their rotation or were specifically asked who was coming in. If for some unexpected reason the one who had agreed to work on Saturday could not do so, he was required to call in to notify the shop supervisor or foreman at least an hour before the shift so that arrangements could be made to have the other one, or if he was also unavailable on such short notice, some other shop employee, to cover the position. (Jt. Exh. 58; E. Exh. 19; Tr. 63–64, 117–118, 1567–1568, 1592–1593, 1735–1740, 1758–1759, 1800–1802.)

On Saturday May 19, 2018, however, neither Jose nor David showed up for work or called in to notify the shop supervisor or foreman. It was an unusual Saturday because the

[10] See also fn. 25, infra (discrediting Garcia's testimony about a subsequent confrontation rity guard in July).

Company had scheduled a barbeque for the employees during the normal work schedule (9 am—3 pm). Martorana had therefore offered the shop employees as a group the option of working the Saturday shift immediately after the barbeque or on Sunday. He had told them to think about it and let him know.[11]

The shop employees were split but the majority preferred to work Saturday afternoon/evening rather than Sunday. About 10–12 of them were discussing this a week or two before the barbeque when their supervisor at the time, Eric Zufall, walked by and remarked that they were going to have to work on Sunday.[12] This confused and upset them, as Martorana had previously said it was their option to decide as a group. So they asked Jose to speak to Martorana about it. Jose agreed and he, David, and about 10 other employees walked to Martorana's office. When they arrived both Martorana and the shop foreman, Richard Gonzalez, were there. Jose and David entered while the rest stood behind them at the door. Jose told Martorana and Gonzalez that the shop employees wanted to work on Saturday after the barbeque rather than on Sunday. Gonzales responded first, angrily saying that he would fire all of them. But Martorana rebuked Gonzales for saying that. He told Jose that it was no problem; that the shop employees could work on Saturday afternoon instead of Sunday if that was what they wanted. (Tr. 67–70, 130–131, 137–138, 260–265, 328, 331–338.)

When Saturday arrived, however, several of the shop employees did not show, for either the barbeque or the subsequent shift. Martorana checked with Zufall and/or Gonzalez to see if the no-shows had called in beforehand to explain their absence. Martorana was told that some had but four had not, including Jose and David. (Tr. 70–71, 126–127, 266–267, 339–340, 1753–1755.)

Martorana therefore decided to issue a "verbal warning" notice to all four employees for a no-call/no-show. He and Zufall met with David first. David apologized and said his mother was sick and asked him to stay home at the last minute. Martorana replied that he should have called in. Martorana and Zufall then met with Jose. Jose protested and told Martorana that it was his Saturday off. So Martorana pulled up the time and attendance records on his computer. The records showed that Jose had also not worked the previous two Saturdays, and Martorana told Jose that. Jose replied that he didn't think that was accurate, but that he might have made a mistake. Zufall at that point told Jose he should just sign the notice as it was only a verbal warning, the lowest level of discipline, and would come off his record within a year. So Jose signed it without further protest or comment.[13]

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[11] Jose testified that Martorana told them they would have to work on Sunday, and that he did not give them the option to work Saturday afternoon/evening instead (Tr. 66–67, 129). However, both David and Martorana testified otherwise; that employees were told they could decide as a group whether to work on Saturday or Sunday (Tr. 258–259, 326–327, 1744–1748).

[12] Zufall no longer works for Athens and could not be located or contacted to testify at the hearing (Tr. 1404–1405).

[13] GC Exhs. 2, 3; E. Exh. 15; Tr. 343–344, 1585–1587, 1594, 1754–1758. See also Tr. 1571 (time and attendance violations are removed from an employee's record after 6 months). At the hearing, Jose acknowledged that he was supposed to work the previous Saturday, May 12, but testified that he had called in sick to Gonzalez. However, he did not testify that he told or Zufall this at the disciplinary meeting. See Tr. 72–75, 134, 244.

The complaint alleges that Jose was disciplined because of his protected concerted activity, i.e., because he had protested on behalf of the shop employees against working on Sunday, in violation of Section 8(a)(1) of the Act.[14] As primary support for this allegation, the General Counsel cites Jose's testimony about a conversation he had with Zufall immediately after the disciplinary meeting. Jose testified that he told Zufall that he didn't deserve the writeup; that he believed he was getting it because he had spoken up for the shop employees about not wanting to work on Sunday; and that Zufall replied, "Yeah, that's what you get for speaking up for the guys and them letting you down" (Tr. 74–78, 142–144). The General Counsel also argues that there is strong circumstantial evidence of animus and a retaliatory motive for the discipline.

However, as indicated by the Company, Jose was not a particularly reliable witness. For example, as noted earlier (fn. 11), contrary to both David and Martorana, he testified that the latter had previously told the shop employees they had to work Sunday and did not give them the option to work Saturday afternoon/evening instead. This was a significant inconsistency as it obviously tended to support the complaint's theory that Martorana resented Jose's request on behalf of the employees to work Saturday instead of Sunday.

Further, as indicated above, it is undisputed that Martorana voiced no objection and readily agreed to Jose's request. There is also no evidence that Zufall was upset by the request. Indeed, he was not even present in Martorana's office at the time.[15] And while Gonzalez was present and upset for some reason, he did not have any actual supervisory authority and was not involved in the subsequent decision to discipline Jose, David, and the other two no-call/no-shows.[16]

As for the circumstances, they fail to support an inference of animus or a retaliatory motive for several reasons. First, as indicated above, while David and Jose did not usually both work on Saturdays, there was no formal alternating schedule. It was left to them to informally decide between themselves their Saturday schedule.

Second, there was no requirement or rule that only one of them could work on Saturdays. Indeed, as indicated above, they were both still listed on the formal Saturday schedule. They were simply allowed to alternate provided at least one of them worked every Saturday. Thus, Martorana—who was not their immediate supervisor and was at the facility only about one

[14] The General Counsel does not allege that the discipline violated Section 8(a)(3) of the Act, i.e., that the Company disciplined Jose Maldonado because he was a union supporter and member of the union bargaining committee.

[15] See also Jose's testimony that Zufall subsequently told him during their post-discipline conversation not to worry about the verbal warning notice and that he would not sign it as the "supervisor" (Tr. 74, 76, 143). The "supervisor" signature on Jose's notice does, in fact, appear different than Zufall's signature as "supervisor" on the other three notices. However, the General Counsel does not contend that this anomaly supports the alleged violation.

[16] The General Counsel does not allege that Gonzalez was a supervisor within the meaning of 1) of the Act during the relevant period. See Tr. 1403.

Saturday a month—would not necessarily have known or assumed that only one of them was supposed to work after the barbeque on May 19.[17]

Third, Jose admitted that neither he nor David notified Zufall or Gonzalez who was going to work on May 19 after the barbeque (Tr. 135, 244). And there is no evidence that either Zufall or Gonzalez told Martorana who they thought was going to work that day.

Fourth, although Jose asserted at the disciplinary meeting that it was not his turn to work that Saturday, the time and attendance records, which Martorana pulled up and reviewed, showed that he had also not worked the previous two Saturdays on May 5 and 12 as well. There is no evidence that either Jose or Zufall offered Martorana any explanation for this at the disciplinary meeting. See fn. 13, supra. Nor is there any evidence that David did so in his prior disciplinary meeting with Martorana and Zufall. Although David apologized and gave an excuse for not showing up for work on May 19, he did not discuss the schedule or what he and Jose had decided about working after the barbeque that day.

Fifth, although Martorana did not interview Jose or otherwise fully investigate why he did not show or call in before deciding to discipline him, there is no evidence that he interviewed David or the other two no-call/no-shows either. And the General Counsel does not allege or argue that Martorana summarily disciplined all the no-call/no-shows to camouflage a retaliatory motive for disciplining Jose.

Finally, while Martorana, like Jose, was not an entirely reliable witness (see fns. 17 and 41), this is insufficient by itself to satisfy the General Counsel's burden to establish that Jose's protected concerted activity was a motivating factor in the discipline. See *Electrolux Home Products*, 368 NLRB No. 34, slip op. at 3 (2019).[18]

Accordingly, the allegation will be dismissed.

3. Alleged July 12, 2018 surveillance and impression of surveillance

As indicated above, the decertification petitions were filed a few months later, on July 6, 2018. The General Counsel alleges that, the following Thursday, July 12, Fleet Manager Martorana and a security guard, Kala Furquan (aka "Q") surveilled employees' union activities

[17] See Tr. 1729–1730, 1800–1802. Martorana also testified that he specifically asked that "all hands be on deck" for the barbeque unless an employee had a previously approved vacation or conflict, and that he had expected that everyone would work afterwards (Tr. 1749–1750). However, this testimony was not corroborated by any other witness or evidence. David and Jose testified that no one told them they both had to show up and work on May 19 (Tr. 221, 325). Further, Martorana did not subsequently discipline anyone for not attending the barbeque or for not working afterwards if they called in. Accordingly, no weight has been given to Martorana's testimony in this respect.

[18] Although *Electrolux* was an 8(a)(3) discrimination case, the same analysis applies in 8(a)(1) retaliation cases. See, e.g., *Tortillas Don Chavas,* 361 NLRB 101 (2014); and *Signature ort*, 333 NLRB 1250 (2001).

and/or created the impression that their union activities were under surveillance in violation of Section 8(a)(1) of the Act.

a. *Alleged impression of surveillance by Martorana*

As discussed above, Jose Maldonado was an open and active union supporter and member of the union bargaining committee. On July 12, shortly before his 6 pm meal break, he was helping a shop mechanic take down the flag by the main office when Fleet Manager Martorana walked by with foreman Gonzalez. Martorana commented that, if Maldonado gave the Union 30 minutes, he had to give the Company its 30 minutes. Maldonado assumed Martorana was referring to his upcoming meal break because it lasted 30 minutes and Thursday was the day each week when the Union typically put up its tent outside the main gate and spoke to the employees during their meal breaks. He thought Martorana was reminding him that, under the LPA, he could only talk to the Union during the 30-minute break and then had to go back to work. So he simply replied, "Yes, that's fine," and that was the end of the exchange. (Tr. 80–83, 155–156, 160–167.)[19]

The test for whether an employer's statement has created an impression of surveillance is whether, considering all the circumstances, the employees "would reasonably assume" from the statement that their protected union activities are being monitored. *Flexteel Industries*, 311 NLRB 257 (1993). See also *National Hot Rod Assoc*., 368 NLRB No. 26, slip op. at 2 (2019); and *Consolidated Communications of Texas Co*., 366 NLRB No. 172, slip op. at 1 n. 1 (2018). The General Counsel contends that this test has been met here; that Martorana's statement would reasonably have been interpreted by Maldonado to mean that the Company was monitoring the time he spent talking to the Union and that it expected him to devote equal time to work.

However, such an interpretation would make no reasonable sense under the circumstances. As Maldonado himself testified, the timing of Martorana's statement indicated that it referred to his 30-minute meal break. By definition, break time is not work time. Further, Maldonado and the other shop employees were not even on the clock during their meal break; they were required to clock out before and clock back in after. Thus, they were clearly not taking time away from the Company by talking to the Union during their meal break.[20]

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[19] Maldonado's testimony about the exchange was not corroborated by the other mechanic, who was not called to testify. However, as the mechanic was a mere bystander employee, no adverse inference is warranted for failing to call him as a witness. See *Pacific Green Trucking, Inc.*, 368 NLRB No. 14, slip op. at 4 (2019), and cases cited there. And the Company does not argue otherwise. Further, Martorana himself did not deny making the statement. Nor did Gonzalez, whom the Company did not call to testify (notwithstanding that, according to Maldonado, he had been promoted to supervisor prior to the hearing). Thus, the General Counsel could have reasonably concluded that there was no need to call the mechanic to testify. Ibid.

[20] See Tr. 183, 345–347, 1647–1648. Maldonado was likewise off the clock with the Company's full knowledge and permission when he attended the contract negotiations. See Tr. 60–61, 108–109, 147–148. See also 2038–2041 (Michael Bermudez, another employee on the union bargaining committee who worked at the Torrance facility, complained that it hurt him to be taken off the schedule to attend the bargaining sessions).

The Company further argues that Martorana's alleged statement made no sense whatsoever under the circumstances, and that it was therefore "clearly a joke" (Br. 87). The General Counsel, on the other hand, argues that "the vagueness and ambiguity of Martorana's statement should be construed against [the Company]" (Br. 38). However, regardless of whether the statement was clearly a joke or vague and ambiguous, as discussed above it would not reasonably have been construed by Maldonado in the manner asserted by the General Counsel.[21] Accordingly, the allegation will be dismissed.

b. *Alleged surveillance and impression of surveillance by Furquan*

Security Guard Furquan often posted in the yard, within view of the union tent, and was responsible for closing the gates at the end of the day. About 6 pm, shortly after the exchange between Martorana and Maldonado, Shop Supervisor Zufall informed Martorana that there was a verbal altercation going on between Furquan and the union representatives and members at the tent; that they were cursing Furquan and calling him a racial epithet.

Martorana immediately called Assistant General Manager Solis, who had left at 5:30 and was driving home. Solis asked who the employees were and Martorana said he didn't know. Solis told Martorana that he should have Furquan take a photo of the employees who were in uniform so they could be identified. Martorana, however, misheard or misunderstood what Solis said because of the poor phone connection and Solis' dialect or accent. He thought Solis said that the employees should not be out on the sidewalk in their uniforms engaging with the Union, and to have Furquan take a photo of them if they did so. Martorana therefore told Zufall to tell Furquan to tell the union representatives that employees could no longer talk to them off the property while wearing their uniforms.[22]

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[21] The Company also argues that Maldonado's testimony indicates that he did not, in fact, interpret Martorana's statement as asserted by the General Counsel. However, as indicated above, the Board applies an objective test in evaluating such 8(a)(1) violations. Thus, while the full context has been considered, no reliance has been placed on Maldonado's subjective impression of the statement. See *Roemer Industries, Inc*., 367 NLRB No. 133, slip op. at 1 n. 3, and 6 (2019), and cases cited there. See also *Waste Stream Mgt., Inc*., 315 NLRB 1099 (1994).

[22] See Tr. 1763–1769, 1803–1807 (Martorana), and 1865–1868, 1886 (Solis). The General Counsel argues (Br. 42–43) that the foregoing testimony by Martorana and Solis should not be credited because the Company did not call Security Guard Furquan, who was clearly acting as its agent on July 12, to testify, and there is no other evidence that there had been a verbal altercation or that union representatives or employees had called him a racial epithet. However, it was not Furquan but Zufall who Martorana testified informed him about the verbal altercation and racial epithet. And, as previously noted, Zufall no longer worked for the Company at the time of the hearing and could not be located or contacted. Further, there is no evidence that Furquan had a practice of filing written security reports.

Moreover, there is no other apparent reason revealed by the record why Martorana and Furquan would have taken the unusual and unprecedented actions they subsequently did that day. Although the timing, within a week after the July 6 decertification petitions were filed, is certainly suspicious, there is no other credible evidence in the record to find or infer a connection between the events. See the discussion above discrediting Csildo Garcia's testimony regarding his alleged conversation with Solis, and below discrediting Michael Bermudez' alleged

n with Torrance General Manager Michael Leidelmeyer.

Furquan walked out to the union tent shortly after and did so. He told the union representatives (no employees were there at the time) that if the employees wanted to talk to the union there, they "had to do it out of uniform." The union representatives protested, saying "that's bullshit" and "this is public property." Furquan replied, "I'm just telling you what [Solis] said. If you don't want to comply, this is what's going to happen. By the time I come back I'm gonna take pictures and let him know that you guys were not complying with what he said." The union representatives responded that Furquan should tell Solis "to go fuck himself," and that "we said, 'shut the fuck up.'" Furquan thereupon walked back to the gate.[23]

About 10 minutes later, Jose Maldonado finished his meal and came out to the tent to talk to the union representatives during the remainder of his break. Another employee, who had recently finished his shift, also came out to the tent. Furquan followed a few minutes later, cell phone in hand. He told Maldonado that he could not wear his uniform while talking to the Union. One of the union representatives objected, saying "[W]e are on public property, sir. And these guys are on their break or off work." Furquan ignored him and asked Maldonado if he was going to comply. However, one of the union representatives again interjected, saying Maldonado was "within his right." Furquan then held up his cell phone and took pictures or video of the entire group.[24]

A few minutes later, Csildo Garcia, who as previously discussed was a driver helper, also came out to the union tent after finishing his shift. Furquan followed shortly after with his cell phone and took a picture from the gate. The union representatives again protested that they were on public property, but Furquan replied, "I'm just doing my job man."[25]

About 15–20 minutes later, both Martorana and Furquan walked out to the tent. Martorana told the union representatives that the Company had informed the employees "that they can't be out here in uniform." He said he was therefore informing the Union that "that's our policy and that's our right." The union representatives again protested, saying, "we don't care about your policy," "this is public property," and the Company can't "control [an employee's] life" after work. Martorana responded, "We can control our property and our property is the company uniforms. Uniforms are our property." The union representatives continued to protest, but Martorana walked away, saying, "You've been informed, my employees are not to be out here in company uniforms."[26]

The next day, Martorana went to see the HR manager, Lupita Ramirez Guerrero, and informed her about the previous day's events. Ramirez told Martorana that he and Furquan should not have said that the employees could not talk to the Union off the property in their

[23] GC Exh. 14(b) (video); Tr. 814–816, 838–839.

[24] GC Exh. 14(c) (video); Tr. 84–86, 171–172, 817–820.

[25] GC Exh. 14(d) (video); Tr. 820–822, 829–837. Garcia testified that Furquan tried to physically make him remove the safety vest he was required to wear at all times while in the yard. However, like his testimony about the prior March or April conversation with Solis, his testimony contained troubling inconsistencies, including about where and when Furquan did this, who else was present, and whether he could understand what Furquan said to him (Furquan spoke English and Garcia's primary language is Spanish). Accordingly, his testimony in this respect has not been credited.

xh. 14(e) (video); Tr. 822–823.

uniforms. She told Martorana he needed to "fix it." Martorana then contacted Solis and told him what Ramirez had said. Solis said Martorana must have misunderstood him and agreed with Ramirez that the situation needed to be "fixed." Martorana therefore told Zufall to tell Furquan not to tell anyone that employees could not talk to the Union off the property in their uniforms. (Tr. 1629–1632,1771–1774, 1832–1833, 1869, 1889, 1891.)

The General Counsel alleges that Furquan's conduct on July 12 (telling the union representatives that employees would not be allowed to talk to them at the tent while wearing their uniforms and that he would take pictures and show them to Solis if they did, and telling employees they could not talk to the union representatives at the tent while wearing their uniforms and photographing the employees when they refused to comply) created the impression that employees' union activities were under surveillance and surveilled employees' union activities in violation of Section 8(a)(1) of the Act.

The allegations are well supported. The Board has long held that photographing or videotaping employees engaged in protected union activity "has a reasonable tendency to interfere" with that activity, even if the union activity is engaged in openly. See *National Steel & Shipbuilding Co*., 324 NLRB 499 (1997), enfd. 156 F.3d 1268 (D.C. Cir. 1998), and cases cited there. Accordingly, photographing or videotaping employees engaged in such union activity is unlawful unless the employer has a reasonable basis to anticipate misconduct during that activity. Ibid. See also *Sysco Grand Rapids, LLC*, 367 NLRB No. 111, slip op. at 26 (2019).

The Company argues that it had a reasonable basis to anticipate misconduct given Zufall's report to Martorana about the earlier verbal altercation between Furquan and the union representatives and members at the union tent. However, even assuming arguendo this is true, Furquan told the union representatives and employees that he was photographing them for an entirely different reason: because Solis had said employees were no longer allowed to talk to the union representatives at the tent while wearing their company uniforms. In these circumstances, employees would reasonably assume from Furquan's statements and actions that they were being monitored solely because they were speaking to the union representatives at the tent in their uniforms (which the Company does not dispute is protected union activity). And Furquan's statements and actions therefore would have had a reasonable tendency to interfere with the employees continuing to do so.[27]

[27] Accordingly, it is unnecessary to address the General Counsel's additional argument (Br. 44) that the Company did not communicate to the employees that it was photographing them because of the prior reported verbal altercation. Compare *Randell Warehouse of Arizona, Inc*., 347 NLRB 591, 598 (2006) (holding that photographing employees during a union election campaign constitutes objectionable conduct unless the reason is explained to the employees or is self-evident), and *Milum Textile Services Co*., 357 NLRB 2047 (2011) (finding that the employer created the impression of surveillance in violation of Section 8(a)(1) by placing a security camera in the employee lunchroom during the union's organizing campaign, as the employer never communicated to the employees that it did so because of prior vandalism there), with *Smithfield Foods, Inc*., 347 NLRB 1225, 1228 and n. 16 (2006) (finding no 8(a)(1) surveillance and impression of surveillance violations even though the employer did not communicate to employees that it had redirected a security camera to focus on their union organizing activities outside the plant because of a prior trespassing incident), rev. denied sub nom. *UFCW Local 204* 06 F.3d 1078, 1086–1087 (D.C. Cir. 2007).

The Company also argues that Furquan's July 12 statements and actions were not unlawful because they did not *actually* interfere with the employees' protected union activity, i.e., the employees did not take off their uniforms or stop talking to the union representatives at the tent.[28] However, as indicated above, the Board applies an objective test in evaluating such alleged 8(a)(1) violations. Thus, as previously noted (fn. 21), the employees' subjective reaction is not controlling. See also *Boeing Co*., 365 NLRB No. 154, slip op. at 2 n. 6, and 53 (2017) (the General Counsel does not have the burden to show that an employer's photographing or videotaping caused actual interference, restraint, or coercion).

Finally, the Company argues that no violation should be found because Furquan's July 12 statements and actions were a one-off "mistake based on a misunderstanding" and had no apparent lasting impact as uniformed employees continued talking to the union representatives at the tent the following Thursday and thereafter (Br. 110, 113).[29] However, the Company never repudiated those statements and actions by admitting its mistake and assuring employees that they had the right to talk to the union representatives at the tent in their uniforms. See *Ark Las Vegas Restaurant Corp. v. NLRB*, 334 F.3d 99, 108 (D.C. Cir. 2003); and *Passavant Memorial Area Hospital*, 237 NLRB 138, 138–139 (1978) (listing the requirements of an effective repudiation to avoid liability for a prior coercive statement). Martorana and Solis both admitted that they never told the employees that the July 12 statements and actions were a mistake based on a misunderstanding (Tr. 1813–1814, 1891). Ramirez likewise admitted that HR never posted anything about them or otherwise assured employees that they could talk to the union representatives at the tent during non-working time without taking off their uniforms (Tr. 1703–1704). And there is no evidence that Zufall or Furquan (neither of whom testified) did either. As indicated above, Martorana only told Zufall to tell Furquan not to tell employees the opposite. In these circumstances, the fact that some employees have continued to talk to the union representatives during their breaks or before or after their shifts is not proof that no other employees have been coerced not to do so. See *National Steel,* 324 NLRB at 502, and 156 F.3d at 1272.

Accordingly, by Furquan's statements and actions on July 12, the Company unlawfully created the impression of surveillance and surveilled employees as alleged.[30]

4. Alleged July 12, 2018 rule restricting uniformed employees from speaking to union representatives

The complaint also alleges, that, by Furquan's and Martorana's statements to employees on July 12, the Company promulgated a rule prohibiting employees from speaking to union

[28] Although Garcia testified that he stopped talking to the union representatives when Furquan came out because he did not want to get into any problems (Tr. 53), as discussed above he was not a credible or reliable witness.

[29] Martorana and Solis testified that they continued to see uniformed employees at the union tent after July 12 (Tr. 1774, 1891). Maldonado also testified that he and other uniformed employees have continued to talk to the union representatives at the tent when they are off the clock (Tr. 157–159).

[30] Although the Company's answer generally denies that Furquan was its agent, the Company's posthearing brief does not dispute that he was acting as its agent on July 12. And the early establishes that he was doing so.

representatives at the tent while wearing their uniforms in violation of Section 8(a)(1) of the Act. This allegation is well supported as well. First, the Company admitted at the hearing that it promulgated the rule (Tr. 305). Second, as indicated above, the Company does not dispute that uniformed employees have a protected right under the Act to speak to union representatives at the tent during their breaks and before and after work. Third, the rule on its face expressly prohibits employees from doing so. See *LA Specialty Produce Co*., 368 NLRB No. 93, slip op. at 3 n. 4 (2019) (a rule that expressly prohibits employees from engaging in protected activity is unlawful under longstanding precedent).[31] Fourth, as discussed above, the Company never repudiated the rule. Accordingly, the Company violated the Act as alleged.

5. Alleged August 2, 2018 surveillance of employees

A few weeks later, on Thursday, August 2, the Union again put up a tent outside the facility. Pursuant to a prior notice it had sent to the Company on July 30, the Union also went inside the yard to speak to employees during their breaks. Twice during the afternoon, at about 1 and 4 pm, two union agents and a union member who worked for Republic Services walked into the yard through the main gate. However, both times, HR Manager Ramirez noticed the Republic employee (who was wearing a Republic uniform) and told the union agents that they could not bring him into the yard. (GC Exh. 23; Tr. 735, 738, 743, 783–784, 1632–1639, 1872.)

Adam Abrahms, the Company's attorney, emailed Paul More, the Union's attorney, about the incidents at about 4:30 pm. Abrahms requested that the Union immediately cease bringing unauthorized competitor employees on the property and take all actions to ensure that union representatives cooperate with requests from management. More responded by email at 4:45 and again at 5:28 pm. In both emails, More stated that, although the Union did not concede to the Company's position, the Union would not bring individuals who work for other hauling companies onto the Company's property in the future. (E. Exhs. 6, 8; Tr. 1118, 1124–1127, 2253–2255.)

Nevertheless, about an hour later, around 6:30 pm, two union organizers, David Acosta and Fernando Hernandez, again entered the yard with the Republic driver, this time to speak to

[31] The complaint and the General Counsel's posthearing brief do not rely on the "expressly prohibits" theory, but instead allege and argue that the rule is unlawful because it was promulgated in response to protected union and concerted activity and to discourage employees from engaging in such activity. However, the theories are closely related and, as indicated above, the relevant facts supporting the "expressly prohibits" theory are undisputed. See, e.g., *IBEW Local 58 (Paramount Industries, Inc.),* 365 NLRB No. 30, slip op. at 4 n. 17 (2017) (holding that it was proper to find an 8(b)(1)(A) violation on an additional theory that the General Counsel had not clearly pursued, as "the conduct was alleged in the complaint," "all of the underlying facts [were] undisputed," "the law [was] well established," and "no due process concerns [were] implicated"), rev. denied 888 F.3d 1313 (D.C. Cir. 2018). See also *Space Needle, LLC*, 362 NLRB No. 11, slip op. at 4 (2015), enfd. 692 Fed. Appx. 462 (9th Cir. 2017); *Intertape Polymer Corp*., 360 NLRB 957, 958 n. 8 (2014), enfd.in relevant part 801 F.3d 224, 232–233 (4th Cir. 2015); and *Parexel Int'l, LLC*, 356 NLRB 516 (2011). Further, the General Counsel never affirmatively and unequivocally stated or conceded during the litigation that the Company's rule does not explicitly prohibit protected union activity. Accordingly, it is y to address the General Counsel's alternative theory.

the shop mechanics who took a 30-minute meal break at that time.[32] The three of them had initially planned to enter through the main gate as before. However, at about 6:20 pm, Security Guard Furquan closed and locked that gate at Fleet Manager Martorana's direction because dispatch had reported that the last truck had returned for the day. They protested to Furquan, saying they had planned to enter the yard. But Furquan just shrugged and refused to let them in. So they walked around and entered through a side gate instead, which was still open. (E. Exh. 22; Tr. 746, 782–783, 792–793, 1774–1775.)[33]

Furquan immediately notified Martorana, reporting that he believed they were hiding in between the parked trucks. Martorana told Furquan to find and tell them that they were not allowed in the yard and were trespassing. Furquan located them shortly after and did so. However, Acosta responded that they had the right to be there and they began walking toward the building. Furquan followed, repeating that they had to leave. (E. Exh. 22; Tr. 747–748, 1775–1776.)

At this point, as they approached the building, Martorana himself confronted them. Martorana said he was told to get them off the property, and if they didn't leave he would call the police. However, Acosta replied that General Manager Solis already knew they were there,[34] and they continued walking up the stairs and into the building's open common break area. Martorana, who was now trailing slightly behind them, continued to protest, saying the mechanics were no longer on their meal break and could not talk to them. (E. Exh. 23 (video); Tr. 748–749, 783–785, 794–796, 1776–1778, 1814–1817.)[35]

However, they continued walking and proceeded toward an adjacent training room where they had met with the shop employees in the past during their meal breaks. Martorana again objected, stating that they were only allowed in the common area. Nevertheless, they opened the door and entered the room, where several shop employees were sitting and eating. Martorana followed them in and asked the employees what time they had clocked out for their meal break. Several of the employees said 6:30. Hernandez then also asked them if they were on their meal break, and they said yes or nodded. (E. Exh. 23; Tr. 280, 730–731, 779–780, 786–787, 796–797, 1780–1781, 1817.)[36]

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[32] The shop employees took their evening meal breaks at different times. Some, like Jose and David Maldonado, took the meal break at 6 pm, and a few took it at 7 pm. However, most took it at 6:30 pm. See E. Exh. 18 (the August 2 meal break schedule).

[33] See also E. Exh. 17 (showing that all of the truck drivers clocked out by 6:30 pm on August 2, except for one who did not clock out until an hour later).

[34] Solis had spoken to them in the yard after Ramirez told them to leave the second time that afternoon. However, unlike Ramirez, Solis did not tell them to leave; he just told the Republic driver to put on a safety vest. (Tr. 740–743, 766–767, 1872–1876, 1893.)

[35] Martorana testified that "they" physically "pushed through" and "bumped" him at this point (Tr. 1776; see also E. Exh. 22). However, the video (E. Exh. 23) indicates that Martorana was already slightly behind them when they reached the bottom of the stairs and that Martorana bumped into Acosta's back shoulder as he was looking down at and typing on his cell phone.

[36] In fact, as Martorana later discovered, some of the shop employees who were in the training room, including Jose and David Maldonado, had taken their meal break earlier. See E. Exh. 18 (Jose clocked out for his break at 5:58 and clocked back in for work at 6:28; and David 6:03 and clocked back in at 6:33). See also E. Exh. 22. Apparently for this reason,

It was now about 6:35 pm. Martorana at that point asked Solis, who he had reached on his cell phone, what he wanted to do. However, Acosta interrupted, warned Martorana that Solis wouldn't want to get involved, and tried to speak directly to Solis in Spanish through Martorana's phone. So Martorana turned and walked out of the room to continue the phone conversation in private. Acosta called out after him, saying "be ready" and "go fuck yourself" as the door closed behind him.

Solis told Martorana not to call the police but to wait and let him see what he could do. Several minutes later, at 6:47 pm, Martorana received a call back from Michael Pompay, the Company's HR Vice President/General Counsel. Pompay told him to let the union representatives stay another 13 minutes, until 7 pm, and then tell them they had to leave or the police would be called.

In the meantime, Furquan entered the training room and used his cell phone to photograph or videotape Acosta, Hernandez, and the Republic employee with the shop employees. Furquan then left but was followed by Shop Foreman Gonzalez. Gonzalez, who had never eaten with the employees before in the training room, walked in with a pizza, sat down on the other side of the room, and began eating it. He continued doing so until the employees and union representatives left about 10 minutes later, shortly before 7 pm. (E. Exhs. 22, 23; GC Exh. 14(a); Tr. 91–92, 193–195, 232–234, 279, 751–754, 787–790, 798–799, 1782, 1817.)

The General Counsel alleges that, by Furquan's and Gonzalez' foregoing conduct in the training room, the Company surveilled the employees' union activities in violation of Section 8(a)(1) of the Act. However, it is not unlawful for an employer to engage in such conduct where it has a reasonable concern about trespassing. See, e.g., *Smithfield Foods, Inc.*, 347 NLRB 1225, 1228 (2006) (employer did not unlawfully surveil employees or give the impression of surveillance by redirecting a security camera to record union handbilling, as the employer had a reasonable concern about trespassing), rev. denied sub nom. *UFCW Local 204 v. NLRB*, 506 F.3d 1078, 1086–1087 (D.C. Cir. 2007).

The record indicates that the Company had such a reasonable concern here. The Union had no absolute right of access to the Company's property under the Act. See *Holyoke Water Power Co.,* 273 NLRB 1369, 1370 (1985) (the right of employees to proper representation by their collective-bargaining representative must be balanced against the employer's right to control its property), enfd. 778 F.2d 49 (1st Cir. 1985), cert. denied 477 U.S. 905 (1986). And the General Counsel has not alleged that the Union had a right of access under the Act and that the Company violated it on August 2. Compare, for example, *North Memorial Health Care*, 364 NLRB No. 61, slip op. at 20 (2016) (employer violated 8(a)(1) by denying representatives of the

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Jose and David Maldonado testified at the hearing that the union representatives and Martorana came into the training room earlier, at 6:05 or 6:10 pm rather than around 6:30 pm (Tr. 89–90, 275–279). However, this testimony is contrary to the weight of the evidence, including the testimony of union organizers Acosta and Hernandez. Accordingly, it has not been credited. Nevertheless, I credit Jose and David's testimony that they had been allowed in the past to take a full hour for their meal break if they did not take their two paid 15-minute breaks during the day (Tr. 202–203, 372–373). Although HR Manager Ramirez testified otherwise (Tr. 1648), neither Martorana nor Solis did so. Further, Martorana admitted that he did not discipline any of the for not immediately returning to work after clocking back in that day (Tr. 1786).

recognized union access to the cafeteria to meet with unit employees), enfd. in relevant part 860 F.3d 639, 646–647 (8th Cir. 2017).

Further, although the LPA affords the Union a limited right of access upon 24-hour notice, the Union had notified the Company that it would be accessing the property that day at 1 pm, not 6:30 pm. And, again, the General Counsel has not alleged that the Union had a right of access under the LPA and that the Company violated it or otherwise failed to comply with its bargaining obligations under Section 8(a)(5) of the Act on August 2. Compare, for example, *Queen of the Valley Medical Center*, 368 NLRB No. 116, slip op. at 34 (2019) (employer violated 8(a)(5) by no longer permitting the union to utilize meeting rooms for meetings); and *Linwood Care Center*, 367 NLRB No. 14, slip op. at 13 (2018) (employer violated Section 8(a)(5) by unilaterally altering the parties' access agreement by, among other things, restricting access to one representative at a time), and cases cited there.

Moreover, the LPA (par. 7) specifically requires the Union to "follow all Employer safety and security protocols while on [the] property."[37] And both Furquan and Martorana had repeatedly told the Union that the yard was closed, that they were trespassing, and that they were required to leave the premises. HR Manager Ramirez had also repeatedly told them earlier that day not to bring the Republic driver into the yard. They nevertheless did so, even though Union Attorney More had assured Company Attorney Abrahms they would not.[38]

Accordingly, the allegations will be dismissed.[39]

6. Alleged August 3, 2018 discriminatory change barring employees from using the training room during meal breaks

As indicated above, there is an open common area in the building, with three round tables and chairs, where employees can eat during their meal breaks. However, shop employees for years regularly took their evening meal breaks in the adjacent room where the Company conducts training and safety meetings. The door to the room did not have a sign restricting it to such meetings and the Company never used it after 6 pm, when the shop employees typically began taking their evening meal (or "lunch") breaks. Further, they preferred the training room to the open common area because returning drivers often used the tables there to complete their paperwork and would talk to them about problems with their trucks. The training room had both

[37] The LPA also provides (par. 14) that all disputes under the LPA will be submitted to expedited and binding arbitration.

[38] There is no direct evidence that the presence of the Republic driver was a reason for locking the gate at 6:20 pm or for Martorana's subsequent request that he and the union organizers leave. However, as indicated above, when Martorana initially confronted them approaching the building, he stated that he had been told to get them off the property. Thus, he had apparently already spoken to someone in management about their presence at that point. Further, the General Counsel concedes (Br. 49 n. 26) that Ramirez' prior objections to the presence of the Republic driver are an "important surrounding circumstance" in evaluating the Company's subsequent conduct.

[39] Given the above findings, it is unnecessary to address the Company's additional arguments that the General Counsel failed to establish that Gonzalez and Furquan were acting as agents of ıy within the meaning of Section 2(13) of the Act on August 2.

more table space and more privacy. It also had a sink and a time clock. (E. Exhs. 2, 3, 4, 17; Tr. 88–89, 182, 204–205, 208, 225–227, 237–238, 270–272, 283–285, 329, 368, 375, 1706–1707.)[40]

Zufall, the shop supervisor, was aware that shop employees took meal breaks in the training room. So were Fleet Manager Martorana, and HR Manager Ramirez. None of them, however, told the employees they could not do so. Nor did they lock the door to the room or otherwise attempt to prevent them from taking meal breaks there. Indeed, Zufall moved a microwave into the room for them. (E. Exh. 23; Tr. 88, 94–95, 207, 224, 375, 1789, 1791.)[41]

However, this all changed on Friday, August 3, the day after the incident in the training room with the union representatives discussed above. The Company locked the door to the room and informed the shop employees that they could no longer take their meal breaks there; that the room was going to be used exclusively for training and safety meetings and as a safe room in active shooter situations. The shop employees therefore began taking their evening meal breaks together outside under a tree. (Tr. 92–97, 238, 280–285.)

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[40] HR Manager Ramirez testified that most drivers do their paperwork in their truck or at the counters in the dispatch area; that they rarely use the tables to do their paperwork; and that she has never seen more than one or two drivers do so after 5:45 pm (Tr. 1642). Driver Ernesto Calvillo, one of the decertification petitioners who was called to testify by the Company, provided similar testimony (Tr. 1454–1460). However, the record indicates that numerous drivers return after 5:45 pm. See E. Exh.17 (showing eight drivers who did not clock out until after 6 pm on August 2, 2018). It also indicates that numerous shop employees take their meal breaks during this time. See E. Exh. 18 (showing that four shop employees took their evening meal break at about 6 pm and 11 shop employees did so at about 6:30 pm on August 2). (E. Exh. 18). Further, the record indicates that Ramirez usually left work between 5:45 and 6 pm (Tr. 235–236, 366), and that Calvillo was also usually gone by 6 pm (Tr. 1454–1460; E. Exh. 17).

[41] Both Ramirez and Martorana admitted that the door had a lock on it and Martorana admitted that he had a key to it (Tr. 1656, 1792–1793). Ramirez also admitted that she did not tell the employees not to take meal breaks in the training room, testifying that she instead told Martorana to (Tr. 1709–1711, 1720). As for Martorana, he confirmed that Ramirez told him to tell the employees not to take meal breaks in the room and testified that he did so. Indeed, he testified that he told them multiple times because the housecleaner complained that they left food and trash there. (Tr. 1793–1796, 1827–1828). However, the only documentary evidence presented to support this testimony was a sign-in sheet for a March 2, 2018 safety meeting he conducted which contained a vague handwritten notation that one of the topics was the "meal period lunch area" (E. Exh. 24). Further, Martorana's actions on August 2 and thereafter belie that he had previously directed the employees not to eat in the room. As shown by the video evidence (E. Exh. 23), he said nothing whatsoever to the employees about being in the room on their meal break when he encountered them there. His only expressed concern was what time they had clocked out for their break. See also Tr. 374, 1822. He also said nothing about the employees having insubordinately taken their meal break there in the detailed 2-page typed report about the incident that he submitted to Solis a few days later (E. Exh. 22). Nor is there any evidence that he ever disciplined any of the employees afterwards for insubordinately doing so. Accordingly, I credit Jose and David Maldonado's testimony that no one in management ever told them prior to August 3 that they could not take their meal breaks there (Tr. 95, 273). And I therefore reject the Company's contention that the employees had never been allowed to aining room and that no change therefore occurred on August 3.

The General Counsel alleges that this change was discriminatorily motivated by the Company's animus against protected union activities in violation of Section 8(a)(3) of the Act. In support, the General Counsel cites the timing of the change, the day after the Company surveilled the union activities in the training room, as well as the Company's previous unlawful surveillance in July.

As discussed above, however, the surveillance of the union activities on August 2 was not unlawful as the Company reasonably believed that the union representatives were trespassing and otherwise refusing to comply with security and management directives. And while the previous surveillance in July violated Section 8(a)(1) of the Act under the Board's objective test, the evidence indicates that it was based, not on union animus, but on Zufall's report of a verbal altercation between the union representatives and Furquan, and on Martorana's misunderstanding of Solis' instructions about how to address it.

Further, the record plainly indicates that the Company's objection was not to the employees meeting with union representatives during their meal breaks, but to them doing so in what the Company perceived to be a working area rather than a nonworking area as required by the LPA. Contrary to the General Counsel's brief, there is no record evidence that any supervisor or manager knew prior to August 2 that union representatives were meeting with employees in the training room during their Thursday evening meal breaks or had authorized them to do so. On the contrary, Martorana's reaction on August 2 when the union representatives approached the training room clearly indicated both (1) that he was not aware union representatives had been meeting with employees there during their Thursday evening meal breaks; and (2) that he did not believe it was an appropriate nonwork area under the LPA for them to do so. See also Attorney Abrahms' subsequent August 7 letter to Attorney More (E. Exh. 9), which referenced the August 2 events and advised the Union that it must comply with all the LPA's parameters, including that access must be limited to non-working areas unless the parties mutually agree otherwise.[42]

Finally, under the circumstances, locking the training room was not a grossly disproportionate response to the union representatives' perceived misconduct and violation of the LPA.[43] As indicated above, the union representatives had repeatedly demonstrated by both their actions and words on August 2 that they were unlikely to stop meeting with the shop employees

[42] The General Counsel has not alleged or argued that locking the training room and preventing the shop employees from continuing to take their evening meal breaks and meet with union representatives there was "inherently destructive" of their statutory rights under the analysis in *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967). The Company therefore was not required to show that its position regarding the training room—that it was a working area under the LPA—was reasonable and arguably correct. See generally *Hawaiian Telcom, Inc.*, 365 NLRB No. 36, slip op. at 2–3, 5 (2017), and cases cited there (discussing the parties' respective burdens under the *Great Dane* analytical framework). See also *Ken Maddox Heating & Air Conditioning*, 340 NLRB 43, 44 (2003) (declining to address an "inherently destructive" theory that had not been alleged or fully litigated).

[43] Cf. *Spurlino Materials*, 353 NLRB 1198, 1221 (2009) (finding that the employer's discipline of an employee was discriminatorily motivated in part because it was out of proportion to the gravity of the employee's relatively minor offense), reaffd. 355 NLRB 409 (2010), enfd. 0, 882 (7th Cir. 2011).

there in the future simply because company managers or supervisors said they were not allowed to. Thus, the Company could reasonably conclude that it was necessary to lock the training room to preserve and enforce its position.[44]

In sum, contrary to the General Counsel, there is insufficient evidence that the Company had animus against the employees' protected union activities or that those activities were a motivating factor in locking the training room and thereby preventing employees from continuing to take meal breaks there.[45] Accordingly, the 8(a)(3) allegation will be dismissed.[46]

B. *Alleged Violations at Torrance Facility*

The Torrance facility (also called LA South or LASO) is the next largest facility, with approximately 150 unit employees. The complaint alleges that the Company committed two 8(a)(3) and/or 8(a)(1) violations at the facility in March and June 2018.

1. Alleged March 21, 2018 interrogation and solicitation of Michael Bermudez to support the antiunion petition

Michael Bermudez worked as a sanitation truck driver for Athens from January 2016 until he was terminated on June 11, 2018. He was an active union supporter and was one of three employees at the facility who served on the union bargaining committee. (Tr. 492–496.)

In March 2018, Bermudez was at the HR office after his shift when Operations Manager Matt Martinez asked him to come into General Manager Michael Leidelmeyer's office. Bermudez did so and found that his field supervisor, Kam Naeole, was also there. Martinez then closed the door and Leidelmeyer told Bermudez that another supervisor, Carlos Altamiano, had seen him on his cell phone while operating his truck. Leidelmeyer asked Bermudez if he loved his job, and Bermudez said he did. Leidelmeyer then asked Bermudez directly if he was on his phone, if he was texting or calling, and Bermudez said he was not. He told Leidelmeyer that he was just changing the Pandora music station at the time. Leidelmeyer replied that he could pull Bermudez' phone records, and Bermudez said, "Go ahead." At that point, Leidelmeyer called Altamiano on a two-way radio and asked if he was 100 percent sure that he had seen Bermudez on his phone. Altamiano said that he was. Leidelmeyer asked Bermudez (who had heard what

[44] As previously noted, the Company primarily argues (contrary to a preponderance of the credible evidence) that the employees have never been allowed to use the training room for meal breaks. However, it alternatively argues that locking the room was not discriminatory because the Union engaged in unprotected trespassing on August 2 (Br. at 128 n. 35). And as found above, a preponderance of the evidence indicates that the Union's trespassory conduct on August 2 (including the Union's refusal to remain in the common break area outside the training room) was in fact the reason for locking the training room on August 3.

[45] *Indiana Hospital*, 315 NLRB 647 (1994), the primary case cited by the General Counsel, is therefore distinguishable.

[46] However, as discussed infra, the Company violated Section 8(a)(5) of the Act by failing to provide the Union with notice and an opportunity to bargain over the effects that the decision to ining room door had on the employees' terms and conditions of employment.

Altamiano said) for his response, and he again denied it. (Tr. 500–504, 1908–1912, 1917, 1948, 1951–1954, 1977–1978, 2000–2005, 2069–2076.)

According to Bermudez, Leidelmeyer then said he wanted to fire him but Martinez and Naeole did not. Leidelmeyer said he would therefore give Bermudez a final written warning and put him on 6-months probation instead.

Bermudez testified that Leidelmeyer then changed the subject and asked him what he thought about the Union. Bermudez responded that it was his first time being involved with a union and it was a learning process. Leidelmeyer replied that Bermudez was a respectable young man; that he had great influence in the yard; that the workers respected him; and that he was going to need his help. Leidelmeyer said there was going to be a petition to decertify the Union and he needed Bermudez to "spread the gospel" about how well Athens had treated him.

Bermudez said that he couldn't do that; that he couldn't turn his back on the employees, and no one would want to work with him if he did. Naeole responded that Bermudez would still have his brother Ignacio there (who worked as a helper at the facility). And Leidelmeyer said Bermudez would also have a couple of "allies," naming several employees who did not support the Union. However, Bermudez said he just couldn't do it. He also complained saying, "This is not cool, how am I going to be able to work now? I'm going to feel paranoid, like I always have to watch my back." Leidelmeyer responded, "Whether you help me or not, this 6-month probationary thing is still on you." And the meeting then ended. (Tr. 505–513, 574–575.)

Based on Bermudez' foregoing testimony, the General Counsel alleges that the Company interrogated him regarding his union sympathies and solicited his help to decertify the Union in violation of Section 8(a)(1) of the Act. However, there are several problems with Bermudez' testimony. First, Leidelmeyer, Martinez, and Naeole all disputed it. All three testified that, after Bermudez again denied the accusation after the two-way radio call to Altamiano, Leidelmeyer simply told Bermudez that he would review the matter further and get back to him. Given that Bermudez already had a final written warning for a prior safety violation, Leidelmeyer also cautioned him to be careful because another safety violation would warrant termination. Bermudez then left. (Tr. 1914–1917, 2005–2011, 2075–2079.)

Second, the Company's progressive disciplinary system does not even include a 6-month probationary period. The only progressive disciplinary steps are verbal warning, written warning, suspension, final written warning, and termination. Nor are safety violations (such as using a cell phone while operating a truck) expunged from an employee's record after 6 months. Rather, both safety and behavioral/performance violations remain on an employee's disciplinary record for 2 years. Only time/attendance violations are removed after 6 months. (Jt. Exhs. 57, 58; Tr. 1568–1575, 1580, 2078–2079.)

Third, the record confirms that Bermudez had been given a final written warning just a month earlier, in February 2018, for safety violations (two preventable accidents since December 2016). Thus, under the Company's progressive disciplinary system, he would not have been given the same or lesser discipline for another safety violation. The only options were

termination or no discipline at all. (GC Exh. 11; Tr. 1572–1575, 1688–1689, 1716–1717, 1722–1724, 2011.)[47]

Fourth, it is undisputed that Bermudez was not, in fact, issued any discipline for the cell phone incident. Leidelmeyer, Martinez, and Naeole all testified that it was ultimately decided not to issue any discipline to Bermudez because it was a "he said, she said" situation without any corroborating evidence. And Naeole told Bermudez so the next working day. (Tr. 512–513, 575, 1917–1921, 1953–1954, 1976, 2009, 2011, 2076.)

Fifth, Bermudez admitted that, other than his brother (whom the General Counsel did not call to testify), he did not tell any other drivers about Leidelmeyer's request for help in decertifying the Union. He also admitted that he didn't tell the Union. When asked why, Bermudez testified that he was afraid the Company would retaliate against him. However, he admitted that he told the Union about another incident involving the decertification petition in May; specifically, that an employee carrying a binder with the names and photos of employees told him that an individual in the personnel office had given him the binder and asked him to solicit the employees' signatures on the petition. Bermudez even submitted a written statement about it to the Union's president, Jay Phillips, and agreed to have Phillips read the statement aloud to Company Executive Vice President Cesar Torres and HR Vice President Pompay at the May 30 bargaining session.[48] Moreover, the employee Bermudez identified was one of the "allies" he testified Leidelmeyer named during the March conversation about the decertification

[47] The General Counsel argues otherwise, citing the following language of the Company's progressive discipline policy:

> The Company has a system of progressive discipline that may include verbal warnings, written warnings, and suspension. The system is not formal, and the Company may, in its sole discretion, utilize whatever form of discipline is deemed appropriate under the circumstances, up to, and including, immediate separation of employment."

(Jt. Exh. 57, at 2.). However, the record indicates that this language was intended simply to clarify that the Company retained the option to bypass the initial steps depending on the nature and severity of the violation. For example, as discussed infra, the Company issued Bermudez a final written warning in late April 2017 for a behavioral/performance violation (making "an indirect comment" that included "the 'N' word"), even though he had not received any prior discipline for a behavioral/performance violation in the previous 2 years. See GC Exh. 10. In contrast, there is no evidence that the Company has ever issued the same or lesser discipline to an employee for another violation in the same disciplinary category or track. Although the record includes a subsequent June 5 final written warning that was prepared for issuance to Bermudez for another behavioral/performance violation (insubordinately refusing to switch trucks with another driver) on June 2, it appears to be just a draft (as discussed infra Bermudez was actually terminated on June 11 for the incident), it is unclear who prepared and signed it, and the General Counsel never pursued the matter after Torres testified that he didn't recognize the signature. See E. Exh. 28, and Tr. 2146–2148.

[48] Tr. 515–517, 580, 583–585, 2123, 2241, 2437. See also Jt. Exh. 62 (listing the individuals ach of the bargaining sessions, including the May 30 session).

petition. Thus, if that conversation with Leidelmeyer had actually occurred, it would have been natural for Bermudez to mention it to the Union in connection with the May incident.[49]

Accordingly, the allegations will be dismissed.[50]

2. Alleged June 11, 2018 discriminatory discharge of Bermudez for insubordination

As indicated above, Bermudez was subsequently terminated on June 11. The General Counsel alleges that the termination violated Section 8(a)(3) of the Act because it was motivated at least in part by Bermudez' protected union activities. However, as discussed below, the evidence fails to prove this allegation as well.

The relevant events leading to Bermudez' June 11 termination occurred 9 days earlier, on Saturday June 2. It was not a typical trash day for two reasons. First, it was the week following the Memorial Day holiday on Monday May 28. Second, because of the Monday holiday, the usual Friday routes had been moved to Saturday. Thus, due to both the holiday and the extra day, it was likely that there would be more trash than usual. (Tr. 1929–1930.)

At about 6:30 am, Field Supervisor Naeole gave Bermudez and the other drivers their assignments and maps for the day. It was Naeole's job to determine and revise the routes as necessary to ensure that each driver could pick up as much trash as possible without going over the truck's weight limit (12 tons). And he had frequently tried to revise Bermudez' Redondo Beach route to reduce overweights without much success. In fact, Naeole had revised the route the previous Friday for this reason. However, Bermudez was still overweight at the end of the day. So, Naeole gave Bermudez the same route on June 2 that he had before the revision. He

[49] This is not to say the two incidents were indistinguishable. It was Bermudez' word against the word of three managers and supervisors (Leidelmeyer, Martinez, and Naeole) regarding the March meeting. However, this difference would only explain why Bermudez did not formally allege a violation of the Act and/or the LPA at the time, when he was still employed by the Company. It does not adequately explain why he would not have told the Union about it at the time. And Bermudez did not offer it as the explanation.

[50] The Company also argues that Bermudez' testimony should be discredited because it is "inherently improbable" that Leidelmeyer would have asked him what he thought of the Union or to help decertify the Union given that he was a well-known union supporter and a member of the union bargaining committee (Br. 148). However, Martinez testified that Bermudez had twice previously complained to him that he was just an observer at the bargaining sessions, had no input in them, and they were hurting him financially because he was missing work to attend them (Tr. 2038–2041). Thus, Martinez and Leidelmeyer reasonably could have concluded that Bermudez' previous enthusiasm for the Union was waning, particularly since there had been little or no discussion or progress regarding economic terms (e.g., wages, healthcare, and retirement benefits) during the previous 4 months of bargaining. In any event, it is unnecessary to rely on the inherent improbability of Bermudez' account given the other substantial problems count discussed above.

told Bermudez that he would call him later to see how he was doing.[51] Bermudez then left with his helper, Oscar Mejia, to do the route.

Several hours later, at about 11 am, Bermudez was about 90 percent through his route when he noticed that the truck was getting full and probably would not be able to finish it. The truck was still packing the trash, but Bermudez anticipated that it would not continue doing so through the remainder of the route. Consistent with the usual practice, he called Naeole on the

[51] Naeole testified to the contrary; that he told Bermudez to call him when his truck was "getting heavy" and he would send him some help (Tr. 1934). And there are some reasons to credit Naeole's testimony on the point. It is undisputed that Bermudez' truck was frequently overweight; that Naeole had repeatedly tried to adjust his route with little success; and that more than the usual amount of trash was expected that day (Tr. 714, 1926–1930, 1959.) Further, Naeole's testimony was consistent in this respect with the written statement he submitted to Martinez on June 4, 2018 about the events (GC Exh. 5). Moreover, although Bermudez denied that Naeole said to call in when his truck was getting overweight (Tr. 522, 540, 639), as discussed above regarding his prior meeting with Leidelmeyer, there are substantial reasons to question his credibility or reliability as a witness.

However, the record as a whole indicates that it would have been highly unusual for Naeole to make such a request of Bermudez, even on a post-holiday trash day. As indicated above, it was Naeole's responsibility to ensure that the trucks did not get overweight by adjusting the routes. (See also Tr. 1898, 2015–2017.) The drivers themselves were not required to closely monitor the weight of the truck or disciplined for failing to do so. On the contrary, they were expected and encouraged to keep picking up trash until the truck could not physically hold any more, i.e., until the truck would no longer "pack" (compress the trash to make room for more trash). (Tr. 523–526, 557–559, 630–633, 713–718, 1960). Although Operations Manager Martinez testified otherwise—that the drivers are reminded during morning stretches to manage their loads so the trucks would not go overweight—his testimony was not corroborated by any other witness. And Martinez admitted that he was not aware of any written policy stating that the drivers are responsible for monitoring the truck's weight. (Tr. 2044–2045.)

Further, there was no precise way for the drivers to know when their truck was overweight. The amount of trash was not itself a reliable indicator (the trash could be heavy or light). And Athens had not installed an onboard weight scale or sensor on its trucks to let the driver know when the load had reached 12 tons. Nor did it teach the drivers how to know or feel the difference between a truck with a 12-ton load and a truck with a 13 or 14-ton load; it only taught them how to know and feel the difference between an empty truck and full truck. (Tr. 526, 529–530, 544–546, 1924–1925, 1958, 1979–1980.) Moreover, there is no credible evidence that Bermudez or any other driver had ever previously been asked to call in when they thought their truck was getting overweight, or that Naeole or any other field supervisor had ever sent out another truck to prevent a truck from going overweight. Finally, as noted below (fn. 52), there are also significant problems with other aspects of Naeole's June 4 statement and hearing testimony about the events.

On balance, therefore, Bermudez' testimony on the point was more credible; Naeole did not tell him to call in when his truck was getting heavy. Further, even if Naeole had done so, Bermudez would not have heard or interpreted it in the same way Naeole testified he intended it. Rather, Bermudez would have heard and interpreted it simply as an acknowledgment that there was probably going to be a lot of trash that day and there was a good chance Bermudez' truck

eep packing through the entire route.

two-way radio to let him know. Although the line was busy, Naeole called him back a few minutes later. Bermudez told Naeole that he was on Huntington and Mackay approaching Phelan and that the truck was still packing but probably wouldn't finish the route. Naeole replied that he would send out Jacinto Pimental, another driver with a Redondo Beach route, to meet him at the corner of Huntington and Phelan and do a "truck switch," i.e., Pimental would take Bermudez' truck to the dump and Bermudez would finish the route with Pimental's truck. Naeole also then spoke to Pimental and likewise told him to do a truck switch with Bermudez at the cross-street.[52]

Pimental, however, had not yet arrived when Bermudez reached Phelan. So, because his truck was still packing, Bermudez continued into the next block. Pimental and his helper, Luis Prado, arrived shortly thereafter and pulled up behind him. Bermudez and Pimental then both got out of their trucks and discussed what to do. They agreed that, instead of switching trucks, Pimental would just finish the route with his own truck. Bermudez therefore returned to his truck, intending to drive it to the dump.[53]

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[52] Naeole testified, again consistent with his prior June 4 statement to Martinez, that Bermudez said his truck was no longer packing during this initial call (Tr. 1935–1936, 1963; GC Exh. 5.) However, Bermudez denied this, testifying, consistent with his own prior statement to the Company, that he told Naeole that the truck was still packing (Tr. 522–525, 642–643; GC Exh. 6.) Pimental also gave a statement to the Company on June 7 confirming that Bermudez told him that the truck was still packing when he arrived to do the truck switch (GC Exh. 30). And Naeole himself admitted that Bermudez told him the same thing when Naeole subsequently called Bermudez and asked why he did not switch trucks with Pimental (Tr. 1932–1934; GC Exh. 5). Accordingly, Bermudez' testimony on this point is more credible.

A different conclusion is warranted, however, with respect to whether Naeole specifically told Bermudez to do a truck switch with Pimental at Huntington and Phelan. Naeolo testified, consistent with his prior statement, that he did (Tr.1937–1938, 1963–1964; GC Exh. 5), while Bermudez testified, consistent with his own prior statement to the Company, that Naeole only said that he would send another driver to help (Tr. 534, 540 –541, 660; GC Exh. 6.) However, Pimental's June 7 statement confirmed that Naeole told him to do a truck switch with Bermudez (GC Exh. 30). Pimental's helper, Luis Prado (Tr. 707), who was called to testify by the General Counsel, also confirmed that Naeole told Pimental this. Accordingly, Naeole's testimony on this point is more credible.

[53] Bermudez testified that, before he talked to Pimental, Prado told him that Pimental did not want to help him, and that Pimental was the one who suggested not switching trucks (Tr. 531–532, 645–646, 657–658). This was consistent with Prado's testimony that Pimental told him on the way there he did not want to switch trucks with Bermudez, and that he spoke with Bermudez before Bermudez spoke with Pimental (Tr. 708–711). However, Bermudez did not mention this to Naeole on June 2, in his subsequent June 7 written statement, or during the investigatory interview with Liedelmeyer the same day. (Tr. 1987; GC Exhs. 6 and 31). This was a striking omission, particularly since the Company had informed the Union, and the Union had informed Bermudez, prior to June 7 that he was being accused by Naeole of insubordination for not switching trucks with Pimental (Tr. 668–670, 2133 –2135). Further, Prado was not an entirely disinterested witness. Like Bermudez, he was a union supporter and was himself later discharged by the Company (for being in the yard without a safety vest) in March 2019 (Tr. 700–702). Thus, considering all the circumstances, including the other problems with Bermudez' iscussed above, the most likely explanation is that it did not happen.

Before he left, however, Naeole called him again. Naeole was out in a pickup truck collecting electronic and household appliance waste in the same area and had noticed both trucks parked on Huntington, one near the cross-street and the other farther down past Phelan. So he called Bermudez and asked if he and Pimental had switched trucks. Bermudez said no because his truck was still packing, and he thought it would save time and allow them to finish quicker. Naeole at this point realized that Bermudez had continued to collect trash beyond the Phelan cross-street instead of stopping and switching trucks with Pimental there as instructed. He told Bermudez that "there would be no need for supervisors if everyone made their own decisions" and instructed him to wait while he talked to Pimental. (GC Exh. 5; Tr. 1939–1942, 1966, 1969–1970, 1981–1983.)[54]

Naeole then called Pimental and asked why he hadn't switched trucks with Bermudez. Pimental blamed Bermudez, saying Bermudez hadn't wanted to switch. Naeole told Pimental he should have called and told him that. However, as there was only about a half-block left on the route, he told Pimental to go ahead and finish the route with his own truck. Pimental therefore did so and Bermudez drove his own truck to the dump as they had previously agreed. (Tr. 1942–1943, 1971.)[55]

In the meantime, Naeole called Operations Manager Martinez and told him what happened; specifically, that Bermudez had been insubordinate by not doing a truck switch with Pimental at the cross-street as instructed. Martinez, in turn, informed Leidelmeyer of the matter on Monday morning. Leidelmeyer told Martinez to get written statements from both Naeole and Pimental. He also asked to see the dump receipt showing how much Bermudez' truck weighed at the scale. (Tr. 1943–1944, 2022, 2079–2081.)

Per Leidelmeyer's request, Martinez obtained Bermudez' June 2 dump receipt. The receipt showed that the net weight of his truck was 14.36 tons, or 2.36 tons overweight. Martinez also asked Naeole to send him an email with all the details of the incident, and Naeole did so that same afternoon. As previously noted (fns. 51 and 52), Naeole's email recounted essentially the same events described above except for two significant details. First, it stated that, when he gave Bermudez his assigned route and map, he specifically told Bermudez "to let me know when he was getting heavy and I will send another truck to help." Second, it stated that, when he later called Bermudez to see how he was doing, Bermudez told him that his truck was not packing anymore. (GC Exh. 5; E. Exh. 27; Tr. 2020–2022.)

After receiving the email. Martinez spoke to Naeole again and asked for his recommendation. Naeole recommended that Bermudez be terminated because he was already on a final written warning for a behavioral/performance violation on April 27, 2017 (making "an indirect comment" that included "the 'N' word"). (Tr. 1945, 2022–2023; GC. Exh. 10.)

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[54] To the extent there are slight differences between Naeole's account and Bermudez' account of this conversation, the former is more credible. However, for the reasons previously noted, no credit has been given to Naeole's testimony that he also specifically told Bermudez that he had wanted the trucks to switch to avoid Bermudez' truck being overweight (Tr. 1969). See also GC Exh. 5.

[55] Although Prado testified that Bermudez finished the route (Tr. 712–713), both Bermudez testified otherwise (Tr. 532–533, 1943). See also GC Exh. 5.

Martinez then also spoke with Leidelmeyer again and provided him with both the dump receipt and Naeole's statement. Martinez was apparently unable, however, to get a written statement from Pimental that day. So Leidelmeyer called Pimental directly and asked him what happened. Pimental confirmed that Naeole told him to switch trucks with Bermudez. (E. Exh. 27; Tr. 2026–2028, 2081.)[56]

Based on this information, Leidelmeyer concluded that Bermudez should be terminated. However, given that Bermudez was on the union bargaining committee in the ongoing contract negotiations, Leidelmeyer decided to confer with Executive Vice President Torres before going forward. He did so on or about June 5. He told Torres that Bermudez had been insubordinate by not following Naeole's instruction to switch trucks. At Torres' request, he also had Martinez send Torres the dump receipt, Naeole's statement, and Bermudez' prior disciplinary notices, including his 2017 and 2018 final written warnings for behaviorial/ performance and safety violations. (Tr. 2082, 2090–2091, 2130–2131, 2146–2147, 2195; E. Exh. 28.)

After speaking to Leidelmeyer and reviewing the documents, Torres decided to inform the Union about the matter and schedule an investigatory meeting with Bermudez. He did so following a bargaining session on June 6. Torres invited the two union business representatives at the meeting into the caucus room and told them about the alleged insubordination incident on June 2; that a meeting was going to be held with Bermudez to get his side of the story; and that a union representative was welcome to attend. The union business representatives then returned and informed Bermudez about what Torres had told them. (Tr. 536–537, 665, 668–670, 2133–2136, 2196, 2248–2249, 2410–2411.)

The meeting with Bermudez was held the following day, June 7. Leidelmeyer, Martinez, and HR Generalist Elsa Alvarez were present for the Company. A union business representative was present for Bermudez. Leidelmeyer said they were there to get Bermudez' account of what happened and showed him Naeole's statement and the June 2 dump receipt. Bermudez disputed both of the two significantly different details in Naeole's statement. He denied that Naeole mentioned his truck being overweight or asked him to call when it was getting heavy. And he denied that he told Naeole that the truck was no longer packing when Naeole first called him. Moreover, he also denied that Naeole told him to stop working until Pimental arrived.

Bermudez then gave Leidelmeyer a written statement he had prepared before the meeting. The statement similarly denied that he told Naeole he was no longer packing and that Naeole told him to stop and switch trucks with Pimental. However, it confirmed that when Naeole subsequently asked him why he hadn't switched trucks, he replied that he "kept working like I always do because my packer was still packing." (Tr. 538–542, 639, 2030–2031, 2084, 2086, 2097; GC Exhs. 6, 31.)[57]

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[56] Martinez testified that he received Pimental's written statement on Monday, June 4 (Tr. 2025). However, it was not included with the other documents Martinez emailed to Torres on June 5. And it is was not signed by Pimental until June 7.

[57] Leidelmeyer testified that Bermudez did not verbally dispute Naeole's statement but simply handed him his prepared written statement (Tr. 2086). However, Bermudez testified otherwise, and his testimony is corroborated by the meeting notes that were apparently taken by Alvarez (whom the Company did not call to testify). See GC Exh. 31, and Tr. 2048–2050, 2097––2104.

After reading Bermudez' statement, Leidelmeyer told Bermudez he was supposed to know when his truck was overweight. Bermudez replied that there was no way for him to know —that drivers are not scales—and that he had previously mentioned this to Alvarez during an employee meeting. He told Leidelmeyer that he believed he was being targeted by the Company because of his union activity. Leidelmeyer shook his head and said it had nothing to do with that. He then asked Bermudez if he had anything else to say, and Bermudez said no. So Leidelmeyer ended the meeting and told Bermudez he would be suspended pending further investigation. (Tr. 544–547, 2030–2031, 2087; GC Exh. 31.)

Sometime the same day, Pimental also provided a short written statement to the Company. It stated that Naeole called him after he finished his route and told him to go to Huntington and Phelan and trade trucks with Bermudez. But Bermudez told him that he still had space to pick up more trash and they didn't do the trade. Instead he finished Bermudez' route. (GC Exh. 30; Tr. 1973, 1985.)

Leidelmeyer met with Torres the following day, Friday, June 8. He informed Torres about both the meeting with Bermudez and Pimental's statement. They then discussed whether Bermudez should be terminated for insubordination in light of his previous final written warnings. Leidelmeyer recommended that he should be, given Pimental's statement confirming that Naeole had instructed him to switch trucks with Bermudez at Huntington and Phelan. Torres agreed. (Tr., 2088–2089, 2102–2103, 2138–2139, 2214–2215.)

Leidelmeyer and Martinez met with Bermudez a few days later, on Monday, June 11. Leidelmeyer told Bermudez he was being terminated and showed him the termination notice. The notice stated that Bermudez had violated company policy on June 2 by engaging in an "act of insubordination resulting in an extremely overweight trash load of 14.36 tons." Specifically, it stated:

> Insubordination—On Saturday, June 2, 2018, in anticipation of a heavy trash load due to the Memorial Holiday, Michael Bermudez was instructed by his supervisor, Kam Naeole to switch his service vehicle (911) with truck 369. This advance directive was to prevent the potential overweight situation I anticipated. The employee took it upon himself with blatant disregard to his directive and continued his route with his regular assigned vehicle. This action resulted in an unsafe work situation because the contents/material of the load came in grossly overweight 14.36 ton trash load. This directive was corroborated by the driver of truck 369 Jacinto Pimental. As part of the investigation, a statement was received by Mr. Bermudez and the secondary driver Jacinto Pimental.

The notice further stated that Bermudez was being terminated for his foregoing act of insubordination because of his "multiple" prior violations of company policy. Bermudez refused to sign the notice and the meeting ended. (GC Exh. 13; Tr. 548–549, 675–676.)

The parties agree that the proper framework for analyzing whether Bermudez' termination violated Section 8(a)(3) of the Act is set forth in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under that framework, the General Counsel must prove by a preponderance of the direct and/or

circumstantial evidence that the employee's protected union activity was a substantial or motivating factor for the adverse employment action, i.e., that a causal relationship existed between the employee's union activity and the employer's adverse action against the employee. This necessarily includes, but is not limited to, establishing that the employee engaged in union activity and the employer knew or suspected it, and that the employer had animus against such activity. If the General Counsel makes a sufficient showing of causation, the burden shifts to the employer to establish by a preponderance of the evidence that it would have taken the same adverse action against the employee even absent the union activity. See *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120 (2019).

Here, there is no dispute that all the supervisors and managers involved in terminating Bermudez knew that he was a strong union supporter and member of the union bargaining committee. Further, while there is no direct or compelling circumstantial evidence that all of them knew about Bermudez' allegation at the May 30 bargaining session regarding the company's involvement in the decertification petition, there is no dispute that Torres, who was at that session and made the ultimate decision to terminate Bermudez, knew about it.

The parties do, however, vigorously dispute whether there is sufficient evidence of animus and a discriminatory motive. The General Counsel argues that there is direct evidence of both based on (1) the Company's other violations, including Liedelmeyer's unlawful conduct at the March 21 meeting with Bermudez; and (2) Bermudez' uncontradicted testimony about certain comments Leidelmeyer and Naeole made to him during the 2–3 months prior to his termination (sarcastically referring to him as a "stupid shop steward" and "superstar," respectively).

However, as discussed above, the evidence fails to establish that Leidelmeyer unlawfully interrogated Bermudez regarding his union sympathies or solicited his help to decertify the Union at the March 21 meeting. And the only violations found (promulgating a rule prohibiting employees from talking to union representatives off the property while wearing their company uniforms and photographing employees who did so) were committed at a different facility, by different supervisors or agents, and were unintentional, based on a misunderstanding of the assistant general manager's instructions.

As for Leidelmeyer's and Naeole's sarcastic comments, Board precedent indicates that such comments may indicate animus under certain circumstances. See, e.g., *Harvey's Resort Hotel*, 234 NLRB 152 (1978) (employer's animus and antipathy toward union shop steward was established by, among other things, supervisor's statement to an employee that the shop steward "was stupid for getting involved in union activities."). Compare also *Luk, Inc*., 255 NLRB 976, 982 (1981); *Precast Mfg. Co*., 200 NLRB 135, 143 (1972); and *Screen Print Corp*., 151 NLRB 1266, 1276 (1965) (finding that various sarcastic comments were evidence of the employer's animus and discriminatory motive), with *Spector Freight System, Inc*., 141 NLRB 1110, 1123–1126 (1963) (finding that a manager's sarcastic and disparaging comments did not establish the employer's animus and a discriminatory motive under the circumstances). However, Bermudez failed to describe the circumstances. For example, with respect to Leidelmeyer's sarcastic "stupid shop steward" remark, Bermudez testified only that Leidelmeyer made the statement to

him while he was outside the dispatch area with Naeole. He could not recall how the conversation started or provide any other details about it. See Tr. 681–688.[58]

The General Counsel also argues that there are a number of other, circumstantial factors indicating that the Company had union animus and a discriminatory motive. As discussed below, however, they are likewise insufficient, either individually or in combination, to carry the burden of proof.

Timing of discipline. As indicated by the General Counsel, the timing of Bermudez' termination, just 12 days after the May 30 bargaining session, is certainly suspicious. However, as indicated above, there is no direct or compelling circumstantial evidence that Naeole, Martinez, or Leidelmeyer, who were initially involved and forwarded the disciplinary matter to Torres, knew about Bermudez' allegation at that session. All three denied knowing anything about it (Tr. 1986, 2034–2035, 2091–2092). And both Torres and HR Vice President Pompay, who interviewed the employee identified by Bermudez the week following the May 30 meeting (June 4–8), denied telling any of them (Tr. 2142–2143, 2199, 2438–2441). Further, Bermudez admitted that Naeole, Martinez, and Liedelmeyer never mentioned the statement to him (Tr. 672).[59] Finally, as previously discussed, given Bermudez' prior final written warnings, Torres had no alternative under the Company's progressive disciplinary policy to terminating him. See generally *Queen of the Valley Medical Center*, supra, 368 NLRB No. 116, slip op. at 3 (all the surrounding facts must be weighed in evaluating whether the timing of an employer's alleged discriminatory adverse action is sufficient to infer animus).

False reasons for discipline. As noted above (fns. 51 and 52), it is highly unlikely that Naeole told Bermudez to call in when he was getting heavy, or that Bermudez told Naeole that he was no longer packing when Naeole called him, as Naeole asserted in his written statement and hearing testimony. And these assertions have been discredited. However, Leidelmeyer testified that Bermudez was not ultimately found to have been insubordinate by failing to call in when he got overweight or terminated for this reason (Tr. 2102–2103). And this is confirmed by the termination notice, which does not even mention that Naeole told Bermudez to call in when he was getting heavy (or that Bermudez subsequently told Naeole that he was no longer packing). Rather, it states only that Naeole told Bermudez to switch trucks with Pimental; that Naeole did so because he anticipated that Bermudez would be overweight; and that Bermudez disregarded Naeole's directive and continued on his route, which resulted in his truck being grossly overweight. Thus, the record indicates that Naeole's discredited assertions were not relied on by the Company in deciding to terminate Bermudez.

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[58] Bermudez also testified that in early May 2018 Naeole berated him for not performing morning stretches with the other drivers, saying, "Who do you think you are?" "You're not better than no one else," and "You're not working as a team member." However, Bermudez admitted that Naeole did not refer to the union or his union activities. See Tr. 685–686.

[59] Bermudez testified that he nevertheless believed Leidelmeyer knew about the May 30 statement. However, the basis for his testimony was unclear and apparently derived from uncorroborated hearsay. See Tr. 673, 683–684, 696–698. Further, the General Counsel's brief does not rely on that testimony as evidence of Leidelmeyer's knowledge. Accordingly, the as been given no weight.

Cursory investigation of alleged misconduct. It is undisputed that neither Bermudez' helper (Mejia) nor Pimental's helper (Prado) was ever interviewed by Naeole, Martinez, or Leidelmeyer about the events on June 2. However, Martinez testified that the helpers are normally outside the truck making sure the trash is collected properly and thus would not hear the radio conversations (Tr. 2046).[60] Further, at no point did Bermudez say or suggest that either of the helpers could confirm his side of the story. Nor was there any other compelling reason to interview the helpers. Pimental himself confirmed orally to Leidelmeyer on June 2 and again in writing on June 7 that Naeole directed him to switch trucks with Bermudez at Huntington and Phelan. While this was not conclusive proof that Naeole told Bermudez the same thing, it was corroborative of Naeole's assertion that he did so. Moreover, Bermudez specifically admitted in his June 7 written statement that he did not switch trucks because his truck was still packing, which confirmed what Naeole had previously reported in his own statement that Bermudez had told him. In these circumstances, it cannot reasonably be found that the Company's investigation was superficial or one-sided. See generally *CC1 Limited Partnership v. NLRB*, 898 F.3d 26, 33 (D.C. Cir. 2018), and cases cited there.

Deviation from normal disciplinary procedures. As indicated above, Leidelmeyer admitted that he consulted with Executive VP Torres because Bermudez was on the union bargaining committee. He testified that, for this reason, he wanted to "tread lightly" and to "make sure that all our t's were crossed and all our i's were dotted." However, Leidelmeyer testified that he had already decided that termination was appropriate, and he simply wanted to make sure Torres was "tight" with that decision. (Tr. 2090–2091.) And Torres corroborated this testimony. Cf. *Advanced Masonry Associates, LLC*, 366 NLRB No. 57, slip op. at 3 (2018) (finding that the safety director's unprecedented decision to consult the company owners regarding a disciplinary matter because one of the two employees involved was a union supporter and the election was a week away, after which the employees' one-day suspensions were escalated to discharges, was evidence that the employer's proffered reasons for their discipline were pretextual), affd. on point 781 Fed. Appx. 946, 967 (11th Cir. 2019). Further, the General Counsel's brief does not specifically argue that Leidelmeyer's decision to involve Torres is evidence of animus or an unlawful motive.

In any event, even assuming arguendo there is sufficient evidence that Bermudez' union activities were a motivating factor in his termination, the Company established that it would have terminated him regardless. The Company's employee handbook (as revised in April 2017) specifically stated that "insubordination, including but not limited to failure or refusal to obey the orders or instructions of a supervisor or member of management" was prohibited conduct (Jt. Exh. 60). And there is no substantial record evidence that the Company had not disciplined

[60] As previously noted (fn. 52), Prado testified that he did hear Naeole tell Pimental to switch trucks with Bermudez at the cross-street. (Although he testified that Naeole told Pimental to do so at the corner of Huntington and "Delano," he likely misremembered the cross-street. I take judicial notice, based on Google Maps, that there is no cross-street named "Delano" in that area. And while there is a Del Amo Boulevard, it is several blocks away and does not cross Huntington Lane.) However, the record indicates that they had recently finished their route. did not need to be outside the truck at the time.

employees who were known by management to have committed such prohibited conduct in the past.[61]

Further, based on its investigation, the Company had a reasonable belief that Bermudez had insubordinately failed to switch trucks with Pimental at the cross-street as directed by Naeole. See *National Hot Rod Assn*., supra, 368 NLRB No. 26, slip op. at 4 ("In order to meet its burden under *Wright Line*, an employer need . . . only show that it had a reasonable belief that the employee committed the alleged offense and that it acted on that belief when it took the disciplinary action against the employee.").[62] This is so even though, as discussed above, the Company apparently concluded that there was insufficient evidence Naeole had expressed a concern to Bermudez about his truck being overweight before directing him to switch trucks at the cross-street. An employee's refusal to follow a supervisor's reasonable and lawful directive may be insubordinate even if the supervisor did not explain to the employee the reason for issuing it.[63] And there is no evidence that the Company had a different policy or practice.

Finally, as discussed above, given Bermudez' prior final written warnings, termination was the appropriate next step under the Company's progressive disciplinary policy for Bermudez' perceived misconduct.

Accordingly, the allegation will be dismissed.

C. *Alleged Violation at Sun Valley Facility*

The Sun Valley facility (also called Peoria) is the smallest, with about 15 unit employees. The complaint alleges just one violation at the facility.

Alleged April 19, 2018 discriminatory discipline of Damien Weicks for unacceptable conduct

Damien Weicks has worked as a bin painter at the Sun Valley facility since August 2017. At the time of the relevant events, he was a known union supporter, was one of three employees at the facility on the union bargaining committee, and had been attending the contract negotiations for about 2 months. (Tr. 386–389, 419–421, 443, 1509; Jt. Exh. 62.)

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[61] Prado testified that he personally knew of several instances during his 3 years of employment at Athens where a driver did not follow a supervisor's instruction. And he provided an example (failing to go back and get a barrel and dump it) where Naeole was aware of it and talked to both him and the driver about it. (Tr. 718, 721–722.) However, Prado did not provide any details about why the driver did not follow Naeole's instruction, what the driver told Naeole afterwards, or whether the driver was disciplined. And the General Counsel's brief does not rely on his testimony.

[62] For the reasons previously discussed, it is unnecessary to address whether Leidelmeyer and Torres also had a reasonable belief, based on Naeolo's account, that Naeole told Bermudez to call in when he was getting heavy and that Bermudez insubordinately failed to do so.

[63] See, e.g., the State of California Employment Development Department (EDD) discussion of what constitutes insubordination for purposes of determining eligibility for unemployment on under the state code, at www.edd.ca.gov/uibdg/Misconduct_MC_255.htm.

On April 17, 2018, Weicks was painting a load of recently washed trash bins when he noticed that one of them still had grease on it that would prevent the paint from sticking to it. He therefore took the bin back to the wash line with a forklift. He then picked up another load of washed bins from the staging area and painted them. However, when he went back to the staging area for another load, he found the same dirty bin he had previously returned to be rewashed. So he picked it up with the forklift and returned it to the wash line again.

Weicks then returned to the staging area to pick up the new load. When he arrived, he saw the operations leadman, Luis Rubio, standing there talking to one of the welders. So he walked over and told Rubio what had just happened; that he had to take a dirty bin back to the washers twice to have it rewashed. Rubio asked Weicks if he had told the washers why he returned it, and Weicks said no because it was common sense and it was not his job to tell the washers what to do. Rubio responded that everyone needed to communicate as a team. Weicks replied, "That's why I'm telling you," and returned to the paint booth with the new load of bins.

After Weicks left, Rubio walked over to the wash line to look into the matter. He saw the dirty bin and pointed it out to the two washers, Miguel Lozano and Nelson Zelaya. They agreed that it still had grease on it but said Weicks hadn't talked to them about it.

Rubio at this point decided to get all three of them together. He told Lozano to go over to the paint booth and tell Weicks to join them at the wash line. When Weicks arrived, Rubio told him that things would work better if everyone communicated with each other. Weicks replied, "I don't speak with them, they are below (or beneath) me, I speak to management." Rubio told Weicks that there needed to be constant communication between everyone. Weicks replied that it was not his job to tell the washers how to do their job and returned to the paint booth.

A few minutes later, however, Weicks called Rubio over to the booth to speak with him in private. He told Rubio that he didn't want to talk to Lozano or Zelaya because they were "management boys" who got preference and believed they were better than everyone else. Rubio told Weicks that everyone was there to do a job and had to work together and communicate. Weicks replied that he was just going to paint and that's it. (Tr. 394–398, 454, 462, 1513, 1524, 1527, 1536; E. Exh. 14.)[64]

[64] To the extent Weicks' and Rubio's accounts conflict, more weight has been given to Rubio's primarily for two reasons. First, as discussed infra, Rubio wrote a detailed statement about the incident the same day (E. Exh. 14; Tr. 1510, 1517). Second, there are substantial reasons to doubt Weicks' account. For example, Weicks testified that he actually returned the dirty bin to the wash line four times; that the first three times Lozano looked at him and said to Zelaya, "man, this motherfucker"; and that the fourth time Lozana looked at him and called him a "fool" (Tr. 396–401, 454–462, 460, 463.) However, there is no mention of this in Rubio's detailed written statement. And both Rubio and HR Manager Ramirez, who subsequently interviewed Weicks, testified that he never mentioned that Lozano referred to him as a "motherfucker" or "fool" or otherwise cursed at him when he dropped off the dirty bin (Tr. 1512, 1532, 1618–1622). Julio Porres, the other bin painter at the time, likewise testified that Weicks didn't mention the washers cursing at him when he questioned Weicks about what had happened (Tr. 1481–1482). Further, there is no apparent reason why Lozano would have been so upset the first time Weicks brought back the dirty bin. The record indicates that Porres and previous bin ularly took dirty bins back to be rewashed, approximately once a day, and that

Rubio briefed Supervisor Eric Reese about the incident shortly after. He also gave Reese a detailed written statement setting forth the facts described above. Reese then called HR Manager Ramirez and informed her about it. Ramirez, in turn, called Rubio and asked him to email her a copy of his written statement, and he did so. (Tr. 1516–1517, 1598–1601, 1664–1668; E. Exh. 14.)

After reviewing the statement, Ramirez contacted the general manager at the facility, Enrique Gonzalez, and they agreed to interview everyone involved the following day. They met with Rubio first, who reiterated what he had previously reported. He also informed them that Lozano and Zelaya had become visibly upset when Weicks said he would not talk to them because they were "below" or "beneath" him. (Tr. 1599–1603, 1666–1669.)

Ramirez and Gonzalez then met with Lozano and Zelaya. They spoke to Lozano first and he confirmed what Rubio had reported; that Weicks said he and Zelaya were beneath him and he only spoke to management, and that he was very offended by Weicks' comment. They then met with Zelaya and he likewise confirmed what Rubio had reported. (Tr. 1603–1608, 1677.)

Ramirez and Gonzalez then met with Weicks. He admitted saying that Lozano and Zelaya were below him and he only spoke to management. He also would not acknowledge that there was anything wrong with saying that. Ramirez told Weicks that this was the problem; that he couldn't be saying things like that to people. Gonzalez likewise told him that it was disrespectful. (Tr. 407–410, 470–472, 478–480, 1609–1610, 1617–1618, 1678–1679.)

Based on the above information, and the fact that Weicks did not have any other discipline on his record, Gonzalez decided to issue Weicks a written warning. He and Ramirez presented the disciplinary notice to Weicks the following day, on April 19. The notice stated that he was being given a written warning for the following reasons:

> Employee stated that he is not going to communicate to other bin shop team members during the course of conducting business for the Company. The employee stated that certain employees were beneath him and that he only talks to management. This type of behavior and direct negative language is creating a [h]ostile work environment and is not acceptable per Athens Code of Conduct Policy. The company has zero tolerance for this type of behavior.

Ramirez read the notice out loud and went over it with Weicks. Gonzalez also stated that Weicks was lucky it was only a written warning; that he could have been given a final written warning or terminated for such conduct. Weicks asked how long the written warning would stay

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Weicks only did so at most once a week. (Tr. 1520, 1534–1535.) Moreover, Weicks admitted that Lozano and Zelaya had never previously objected when he brought back a dirty bin (Tr. 459). Finally, the record indicates that profanity was common at the facility; that no one ever complained about it; and that Weicks himself used the terms "motherfucker" and "fool" (Tr. 1482–1483, 1506). Thus, even if Lozano did refer to Weicks as a "motherfucker" or "fool" when off the dirty bin, Weicks may very well not have mentioned it to Rubio or Ramirez.

on his record, and Ramirez said 2 years. Weicks then signed the notice without further comment. (Tr. 416, 1613–1624, 1681; GC Exh. 4.)[65]

Like Bermudez' termination, the General Counsel alleges that Weicks' discipline violated Section 8(a)(3) of the Act because it was motivated at least in part by his union activities. In support, the General Counsel again cites the Company's unfair labor practices at the other facilities. However, as discussed above, no violations have been found at the Torrance facility and the few 8(a)(1) violations found at the Pacoima facility fail to establish the Company's animus under the circumstances.

The General Counsel also cites the testimony of a former employee, Brendan Farris, about a meeting he had with HR Manager Ramirez prior to the subject incident. Farris was employed as a beginning welder at the facility from September 2017 until he was terminated for performance issues in May 2018. He was a work friend of Weicks and they sometimes ate lunch together. He testified that, in March 2018, Ramirez met with him and asked if he had seen or witnessed Weicks promoting or talking about the Union, and whether he felt Weicks was creating a hostile work environment. He said no; that he and Weicks only talked about cars or work or life and stuff like that. And that was the end of the meeting. (Tr. 599.)[66]

However, there are several problems with this testimony. First, Ramirez denied that she ever had such a meeting with Farris. She testified that she only met with him twice—about 30 days before he was terminated to discuss his performance and the day of his termination—and she never asked him about Weicks or his union activities. Indeed, she testified that she never even received any complaints about Weicks' union activities. (Tr. 1625–1628.) Second, Farris' testimony was not corroborated by any other direct or indirect evidence. For example, notwithstanding that they were work friends, there is no evidence that Farris ever told Weicks about the meeting with Ramirez. Third, given both his prior friendship with Weicks and his prior termination from the Company, Farris was not an entirely disinterested witness. Accordingly, his testimony about the meeting has not been credited.

Finally, there is also no substantial circumstantial evidence of animus and a discriminatory motive. Although Weicks had begun attending the contract negotiations 2 months before he was disciplined, there is no evidence or contention that he did or said anything during those bargaining sessions that might have prompted the Company to target him.[67]

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[65] To the extent there are direct conflicts between Weicks' and Ramirez' accounts of the two meetings, Ramirez' account has been given greater weight for the reasons previously noted and because it is more consistent with the record as a whole.

[66] Without objection, Farris was permitted to testify by videoconference from the NLRB Resident Office in Birmingham, Alabama.

[67] Both Executive VP Torres and Attorney Abrahms testified on direct examination that Weicks raised or commented on at least one issue (a schedule change or some other change at the Sun Valley facility) at one or more bargaining sessions (Tr. 2126, 2248). However, they either did not identify or could not recall for certain whether he did so before or after April 17. And the General Counsel did not pursue the matter on cross-examination (or question Weicks d does not rely on their testimony.

In any event, even assuming arguendo the evidence establishes that Weicks' union activities were a motivating factor, the Company established that it would have issued him the written warning anyway. As discussed above, there is no dispute that Weicks told Rubio, in the presence of washers Lozano and Zelaya, that he would not talk to them because they were "below or "beneath" him. And the record includes several examples where the Company issued the same or more severe discipline to other employees at its three facilities for offensive or inappropriate comments or behavior in 2017 and 2018, notwithstanding that, like Weicks, they did not have any other behavioral/performance violations in the previous 2 years. See GC Exh. 10, and E. Exh. 16.

Accordingly, the allegation will be dismissed.

II. ALLEGED 8(A)(5) VIOLATIONS

A. *Alleged August 2018 Unilateral Change Prohibiting Employees From Using the Pacoima Training Room During Breaks*

As discussed in section I.A.6 above, since August 3, 2018 the Company has prevented employees at the Pacoima facility from using the training room during their meal breaks as they had been allowed to do in the past. The General Counsel alleges that the Company violated Section 8(a)(5) of the Act by doing so unilaterally, "without prior notice to the Union and without affording the Union an opportunity to bargain . . . with respect to this conduct and without bargaining with the Union to an overall good-faith impasse for an initial collective-bargaining agreement," citing *Bottom Line Enterprises*, 302 NLRB 373 (1991) (absent extenuating circumstances, an employer generally may not make unilateral changes in terms and conditions of employment during negotiations for an initial contract, absent an overall good faith impasse in the negotiations).[68]

However, as discussed above, there were extenuating circumstances here. On August 2, the day before the Company locked the training room, the Union had repeatedly refused to comply with a variety of management and security directives, including a directive not to enter the training room. Given these circumstances, the Company's decision to begin locking the room on August 3 was not discriminatorily motivated in violation of Section 8(a)(3) of the Act. And the same circumstances excused the Company from giving the Union notice and an opportunity to bargain before doing so. Cf. *Phelps Dodge Copper Products Corp*., 101 NLRB 360 (1952) (union's unprotected slowdown/partial strike in support of its contract demands suspended employer's duty to bargain over the contract).

The Company, however, was not excused from providing the Union with notice and an opportunity to bargain with respect to the decision's impact on the employees' terms and conditions of employment. See generally *International Bridge & Iron Co*., 357 NLRB 320, 322–323 (2011); and *AG Communication Systems Corp*., 350 NLRB 168, 172 (2007), and cases cited there (effects bargaining may be required even if bargaining over the decision is not). The Company gave the Union no such notice or opportunity. Although it told the Union that it was not allowed access to the training room, it never told the Union that employees would no longer

[68] The General Counsel does not allege that the Company violated Section 8(a)(5) of the Act by preventing the Union from continuing to meet with employees in the training room after Compare, for example, *Queen of the Valley Medical Center*, supra.

be allowed access during their meal breaks as well. Further, while the employees themselves were made aware of the Company's new policy, the Board has held that notice to employees is not sufficient notice to the union. See, e.g., *Champaign Builders Supply Co*., 361 NLRB 1382, 1386 (2014), citing *Bridon Cordage, Inc*., 329 NLRB 258, 259 (1999).

The Company argues that it did not have a duty to bargain with the Union because there were other areas for the employees to take their meal breaks—including the common break area just outside the training room—and thus locking the room did not, in fact, have any material or substantial impact on their working conditions.[69] However, as indicated by the General Counsel, the Board in several cases has held that preventing employees from continuing to take meal breaks in a certain area constitutes a material and substantial change notwithstanding that they were provided alternative areas to do so. See *Indiana Hospital,* 315 NLRB 647, 655 (1994); and *Advertiser's Mfg. Co.*, 280 NLRB 1185, 1191 (1986). See also *Blue Circle Cement Co., Inc.*, 319 NLRB 954 (1995), enf. denied in relevant part on other grounds 106 F.3d 413 (10th Cir. 1997).

The Company also argues that it had no duty to bargain with the Union for various other reasons, including (1) because the City of Los Angeles, through its franchise ordinance, "coerced" the Company into agreeing to a labor peace agreement providing for recognition based on a card check, and the Company therefore "did not truly voluntarily recognize the Union"; (2) because after the Company recognized the Union based on a card check, the employees "did not receive notice of the recognition and of the right to file a decertification petition"; and (3) because "based on uncontradicted reports [the Company] received," the decertification petitions that were filed on July 6, 2018 were "signed by a *majority* of the employees in their respective bargaining units," and the Union "refused to provide any . . . proof" otherwise (Br. 30–31).

However, there are numerous problems with these arguments. First, as previously discussed, the City's franchise ordinance did not require the Company to execute a card-check agreement, but only an agreement ensuring that there would not be any strikes or similar service interruptions due to labor disputes with the Union. The Company was "coerced" to agree to a card-check procedure only in the sense that the Company needed a labor peace agreement to obtain a franchise contract with the City, and the Union insisted on various favorable provisions, including a card-check procedure, as a condition of agreeing to one. See *Airline Service Providers Assn. v. Los Angeles World Airports*, 873 F.3d 1074 (9th Cir. 2017) (finding that a similar ordinance applicable to employers doing business at the Los Angeles International Airport was not preempted by federal labor law, notwithstanding the employer association's

[69] The Company argues that there are also two other areas in the facility for the shop employees to take their meal breaks: a kitchen and a break area in the shop itself near the parts and supply department. However, the kitchen is located where the management offices are (GC Exh. 2), and there is no credible evidence that the shop employees were ever told they could use that area or that they ever did so. Although Martorana testified that he had seen shop employees in the kitchen (Tr. 1835), HR Manager Ramirez, whose office is near the kitchen, testified otherwise (Tr. 1649–1650). See also Jose Maldonado's testimony, Tr. 214 (no one ever said we couldn't use the kitchen, but none of us ever went in there). Further, when asked where the shop employees could take their meal breaks after the training room was locked on August 3, Martorna did not mention it. (Tr. 93, 215–216, 280–282). As for the break area in the shop, there ce that it existed at the time of the relevant events. See Tr. 1651.

argument that it provided unions with a "powerful bargaining chip" to obtain benefits from employers in exchange for a labor peace agreement), cert. denied 139 S.Ct. 2740 (2019).

Second, recognition based on a card check is just as valid under Section 9 of the Act as recognition based on a secret-ballot election. See *Mine Workers v. Arkansas Oak Flooring Co*., 351 U.S. 62, 71–72 (1956). See also the Board's Notice of Proposed Rulemaking, Representation-Case Procedures, 84 FR 39930, 39938 (Aug. 12, 2019) ("voluntary recognition based on a contemporaneous showing of majority support" is an "undisputedly valid procedure").

Third, there is no legal authority holding that an employer's voluntary recognition of a union based on a card check is invalid unless the employees are notified thereafter of their right to file a decertification petition. Neither *Dana Corp*., 351 NLRB 434 (2007), the case cited by the Company, nor *Lamons Gasket Company*, 357 NLRB 739 (2011), which overruled *Dana Corp*., established any such rule or policy. Rather, the issue addressed in those decisions was whether employees should be allowed to file a decertification petition anytime following the employer's voluntary recognition of the union or, if they are provided notice of their right to do so, within 45 days thereafter.

Fourth, "the Board has consistently held that Section 10(b) of the Act precludes an employer from defending against a refusal-to-bargain allegation on the basis that its initial recognition of the union, occurring more than 6 months prior to the filing of unfair labor practice charges raising the issue, was invalid or unlawful." *Alpha Associates*, 344 NLRB 782 (2005), citing *Route 22 Honda*, 337 NLRB 84, 85 (2001); *Morse Shoe*, 227 NLRB 391, 394 (1976), supplemented by 231 NLRB 13 (1977), enfd. 591 F.2d 542 (9th Cir. 1979); and *North Bros. Ford*, 220 NLRB 1021 (1975). As indicated above, the Company recognized the Union based on a majority card showing in September 2017, approximately 11 months before the subject unilateral change.

Fifth, there is no evidence that the Company ever asserted any of its above arguments at the time of the relevant events; rather, it continued to voluntarily recognize and bargain with the Union over an initial contract before, during, and after. In these circumstances, the Company was "obligated to fulfill all aspects of its bargaining obligations," *T-Mobile USA, Inc*., 365 NLRB No. 23, slip op. at 2 (2017), enfd. mem. per curiam 717 Fed. Appx. 1 (D.C. Cir. 2018), including bargaining with the Union over the effects on employees of material and substantial changes in their terms and conditions of employment.

Finally, there is no record evidence supporting the Company's assertion that the July 6, 2018 decertification petitions were signed by a majority of the employees in each unit or that the Company received any such reports. As indicated above, the petitions (Jt. Exh. 52–54) state only that they were supported by at least 30 percent of the unit employees. Further, all of the other testimonial and documentary evidence cited by the Company either does not support its assertion or is self-serving and uncorroborated hearsay. See Br. at 13, citing Tr. 2168–2170 (Torres), 2292–2294 (Attorney Abrahms), and 2455–2457 (Pompay), and E. Exh. 30 (a scripted presentation Attorney Abrahms prepared for a November 27, 2018 bargaining session with the Union). Thus, as far as the record shows, the Union has enjoyed a presumption of majority status at all relevant times. See *Levitz Furniture Co*., 333 NLRB 717, 725 (2001) ("[A]n ay rebut the continuing presumption of an incumbent union's majority status, and

unilaterally withdraw recognition, only on a showing that the union has, in fact, lost the support of a majority of the employees."). See also *Wyman Gordon Pennsylvania, LLC*, 368 NLRB No. 150, slip op. at 8 (2019); and *Alpha Associates*, above.

In short, the Company's arguments are without merit under current law. Accordingly, for the reasons discussed above, the Company violated Section 8(a)(5) by failing to provide the Union with notice and an opportunity to bargain over the effects on employees of the decision to begin locking the training room on August 3.

B. *Alleged March 2019 Bad Faith Withdrawal of Prior Contract Proposals*

The final allegation is that the Company engaged in regressive bargaining in March 2019 in violation of Section 8(a)(5) of the Act by withdrawing its previous January 11, 2019 contract proposals to the Union. For the reasons set forth below, the record fails to support this allegation.

As previously discussed, the parties began bargaining for an initial contract in November 2017. Over the following year, they held 18 bargaining sessions, on November 30 and December 13, 2017, and January 16, February 8, March 12 and 27, April 6, May 11, 30 and 31, June 6 and 26–28, July 2 and 18, October 31, and November 27, 2018. (Jt. Exh. 1.)

All of the sessions were held at a local hotel and both sides were represented by multiple individuals. Attorney Abrahms and Executive VP Torres attended every session on behalf of the Company. Abrahms was the chief negotiator and spokesperson for the Company, and he communicated that to the Union. Torres had the sole authority to approve proposals and sign tentative agreements (after consulting with his management peers). Abrahms' associate, Attorney Christina Rentz, also attended many of the sessions, as did HR Vice President Pompay (one of the management peers Torres consulted). (Jt. Exh. 62; Tr. 858, 930, 935–938, 1046, 1103–1104, 2113, 2150–2151, 2157–2158, 2207, 2265–2269, 2443–2444.)

The Union's chief negotiators were Union President Phillips and Attorney Joe Kaplon, who handled collective-bargaining matters for the Union. At least one of them, or Kaplon's associate, Attorney Elizabeth Rosenfeld, attended every session. Also on the union bargaining committee were Business Representatives Jim Smith, Percy Martinez, and David Acosta, and at least two of them likewise attended every session. Ron Herrera, the Union's Secretary-Treasurer and ranking officer, also attended a few sessions, on March 27 and October 31, 2018. Organizers from the International Union attended several of the sessions as well. As previously discussed, several employees from each yard were also on the committee and a total of five to eight of them attended every session. (Jt. Exh. 62; Tr. 939–940, 1044–1045, 1087.)

Beginning on April 6, 2018, a federal mediator also attended every session (Jt. Exh. 62; Tr. 2266–2267).

At the outset, the parties agreed to negotiate language and noneconomic items before economic items. They also agreed to exchange proposals in writing. Over the entire year of bargaining, the Company never made an oral proposal at the bargaining table. The proposals were always presented in writing. If any changes were agreed to after caucusing or in sidebar , those changes were likewise immediately put in writing using a computer and

printer the Company brought to all the bargaining sessions. (Tr. 919–920, 1105–1107, 1134–1137, 1212, 2153–2158, 2261–2264, 2267–2268, 2443.)

Over the course of the year, the parties reached 18 tentative agreements, mostly with respect to language and other noneconomic items (Jt. Exhs. 1, 8). However, the parties failed to reach a tentative agreement with respect to union security, which was particularly important to the Union. The Union's initial proposal on November 30, 2017 included a standard clause requiring all employees to pay dues and fees as a condition of employment (Jt. Exh. 9). Whereas the Company's initial proposal did not include such a provision (Jt. Exh. 10). Abrahms stated at the time that the provision was omitted from the Company's proposal because he wanted to leave the issue to the end. He also later stated that the Company was opposed to such a provision because recognition had been granted based on a card check rather than an election, and because a large number of employees did not support the Union and wanted to decertify it. (Tr. 942–943, 949–950, 1167–1171, 2165–2166, 2287–2290.)

The parties also failed to reach tentative agreements with respect to any of the major economic items, such as wages and medical and retirement benefits. They first exchanged proposals on such items at the bargaining sessions on June 6 and 26–28, and they were substantially different.

For example, the Union proposed that healthcare insurance would be provided through the Teamsters Sanitary Industry Trust (TSIT) with the employer contributing $1278 per month per employee in the first year.[70] Although the specifics of the plan were not set forth in the proposal, the Union orally told the Company that the plan would provide employees with the same level of coverage and benefits as employees of Athens' competitors. The Union also provided the Company with a TSIT summary plan description. Based on this information, the Company understood that the Union's proposed TSIT plan would require only a $15 employee copay, provide 100 percent hospitalization and family coverage for all employees, and also include dental, vision, and chiropractic care.

The Company, on the other hand, proposed that the employees would remain in its group health insurance plan on the same basis as nonunit employees. That plan required a higher $30 copay and provided only 70 percent hospitalization. It also only provided full family coverage to the truck drivers; other employees had to contribute 50 percent for family coverage. However, it cost the Company only about $750 per month per employee, considerably less than the $1278 cost of the TSIT plan.

With respect to retirement benefits, the Union proposed that the employees would participate in the Teamsters pension fund, with the Company contributing $2.15 per hour per employee in the first year. The Company, on the other hand, proposed that employees would continue to participate in its 401(k) plan on the same basis as nonunit employees, with the Company matching employee contributions up to a maximum of 1 percent of the employee's gross earnings.

[70] Although the initial proposals referred to the Western Alliance Trust Fund, this was likely ste error from prior Teamster contracts. See Tr. 1077, 2274–2275.

The parties' initial proposals were also far apart with respect to wage increases. (Jt. Exhs. 1, 31–34; E. Exh. 7; Tr. 950–955, 1024–1026, 1075–1077, 1143–1146, 1149–1150, 1162, 2159–2161, 2165, 2216–2217, 2270–2274, 2356, 2454, 2490.)

The parties made some movement on all these issues during subsequent bargaining sessions. For example, on July 2, the Company offered the Union a second option with respect to healthcare contingent on the Union agreeing to the Company's 401(k) retirement proposal. Specifically, if the Union agreed to its 401(k) proposal, the Company would agree to participate in the TSIT and contribute $650 per month per employee to the healthcare plan, with employees contributing the remaining premium balance. The Company also raised its proposed maximum contribution to the 401(k) plan to 1.5 percent on July 2, and to 2.25 percent on July 18, of the employee's gross earnings. (Jt. Exhs. 35–48.)

As for the Union, at the next session on October 31, it dropped its pension proposal in favor of the Company's 401(k) plan. However, the Union proposed a different contribution system. Specifically, the Union proposed that the Company would contribute $2.50 per hour per employee to the 401(k) plan instead of matching employee contributions. The Union also modified its healthcare proposal to reduce the Company's contribution to $1200 per month per employee, with employees paying the additional amounts if the Company's contributions were inadequate to maintain all of the benefits. (Jt. Exh. 49; Tr. 944.)

At the same session, in response to the Union's movement, the Company raised its proposed healthcare contributions to the TSIT under the second option to $700 per month per employee. And the Union responded to the Company's movement by reducing the Company's proposed 401(k) contributions to $2 per hour per employee in the first year. (Jt. Exhs. 50, 51.)

The next session—and the last session with the full bargaining teams—was on November 27. As indicated above, the parties at that time had made some progress but had not reached agreement on the terms of the healthcare and 401(k) plans or on wage rates. Union security was also still a sticking point. Abrahms began the meeting by addressing this last issue, telling Kaplon, Phillips, and the other members of the union bargaining committee that the Company was never going to agree to a union security clause unless the July 6 decertification petitions were unblocked by the Union's ULP charges and the employees had an opportunity to vote in an election. He said if the Union wanted to proceed with negotiations and try to finalize an agreement on the other open items that day, it would have to either withdraw its charges or withdraw its union security proposal.

Following a caucus, Kaplon flatly rejected both options. He and/or Phillips said the Union had other options, including taking the matter to City Hall and "the street." The conversation then became heated and descended into a shouting match. The parties therefore ended the meeting without any further bargaining. Contrary to past practice, they also did not discuss or schedule dates for future meetings. (E. Exh. 30; Tr. 873, 977–981, 1171–1182, 1186, 2167–2172, 2293–2297, 2456–2457.)[71]

[71] Abrahms testified that Kaplon actually said he thought the parties were at "impasse" (2476 – 2479). However, Abrahms' testimony was not corroborated by Torres. And Smith denied that there was any discussion of impasse at the meeting (Tr. 873). Further, Abrahms' scribbled notes ssion do not appear to mention any such declaration or discussion.

However, the following month the Company began getting pressure from the City Council to reach a resolution with the Union. The Company was particularly concerned about this for two reasons. First, because the Company was seeking some price concessions from the City under the franchise contract at the time. And second, because the Union was asserting that the Company's alleged conduct violated both the Act and the LPA, which could jeopardize the franchise contract itself. The Company therefore directed Abrahms to see if he could come up with a path forward to reach a global resolution of both the contract issues and the Union's ULP charges. (Tr. 2172–2175, 2457–2459.)

Abrahms contacted Union Secretary-Treasurer Herrera shortly after and they agreed to meet over lunch at a local restaurant on January 4, 2019 to discuss the matter. Abrahms told Herrera at the meeting that he had an idea about how to get past the union security/decertification hurdle. The idea or concept was to combine a contract ratification vote with a decertification or "rejection" vote; that is, whatever contract the parties agreed to would be presented to the employees for ratification, and if they voted no, that vote would also be considered a rejection of the Union and it would walk away and no longer represent them.

Abrahms told Herrera that he had not yet run the idea by the Company. He also said that there were a number of legal and procedural matters that would likely need to be addressed to ensure the concept worked, including the Union's pending ULP charges and the decertification petitioners' pending petitions. But he indicated that he thought the idea was worth putting before the Union and the Company. Herrera agreed and said he would talk to Phillips about the idea. As for the related legal and procedural issues involving the pending charges and petitions, he said that Abrahms should talk directly with More, who handled such matters for the Union. (Tr. 1268–1270, 1275, 1278–1279, 1330, 1337–1345, 1382–1383, 1394, 2305–2308.)

Later that day or the next, Herrera told both Phillips and More about Abrahms' idea for a combined ratification/rejection vote and they agreed to it. Abrahms likewise presented the idea to the Company and it authorized him to continue exploring the concept with the Union and to put a global package together for its consideration. (Tr. 1279–1280, 1345–1346, 2177–2179, 2308, 2311, 2460, 2480.)[72]

Abrahms and Herrera subsequently spoke by phone and agreed to set up a meeting at the Union's office on January 11 after another meeting they had scheduled to discuss a contract with Araco, a sister company of Athens. They agreed that it made sense to start with the open contract issues before addressing the details of the ratification/rejection vote and the pending ULP charges and decertification petitions. They both understood, however, that a contract was only one part of the global resolution and was contingent upon the parties reaching agreement on the other parts. (Tr. 1279, 1395, 1399, 2310, 2311–2313.)

Herrera subsequently informed Phillips and Business Representative Smith of the meeting and requested them to attend the January 11 meeting on behalf of the Union. However, given the nature of the discussions—that they would just be discussing what it would take to get to a final agreement rather than exchanging proposals—no arrangements were made to have any

[72] Phillips testified that he was not told about Abrahms' ratification/rejection idea until much later, in March 2019 (Tr. 1193–1194). However, Herrera testified that he told Phillips about it y after the January 4 meeting with Abrahms.

of the other members of the union bargaining committee present. (Tr. 877, 904–905, 984, 987, 994.)[73] Torres and Pompay likewise decided not to attend on behalf of the Company for essentially the same reason, i.e., because the meeting was preliminary and exploratory, and the Company did not intend to approve anything without reviewing the entire package. (Tr. 2181–2182, 2186, 2207, 2460–2461.)[74]

The meeting occurred at the Union's office several days later as scheduled. As indicated above, only Abrahms and Phillips and Smith attended. Herrera was there briefly at the beginning but left the room before the substantive discussion began. None of the other members of the respective bargaining teams were present. Nor was a federal mediator. (Tr. 987–988, 1047–1050, 1203, 1310, 1350–1351, 2310.)

Abrahms began the meeting by going through each of the approximately 10 open contract issues and indicating what he understood, from prior discussions with Torres and other Athens executives, that they would or might agree to if there was a combined ratification/rejection vote on the contract and the other legal and procedural issues were also resolved.[75] With respect to

[73] Smith and Phillips testified that there may have been other reasons for not having the full union bargaining committee there; for example, because the meeting was scheduled with little notice or because they expected the meeting to be either too short or too long (Tr. 904, 1009, 1050). However, the record as a whole indicates that the actual reason was another possibility Smith mentioned: that "sometimes you just want to have, like a frank discussion with the employer and hammer out some issues and just discuss what it would take to get a final agreement" (Tr. 905).

[74] Herrera and Abrahms gave conflicting testimony about whether Abrahms expressly told Herrera during their phone conversation or before the January 11 meeting began that he had no authority to make proposals. However, regardless of whether Abrahms did so, a preponderance of the evidence indicates that it was otherwise obvious from the content and context of their phone conversation and understood by Herrera.

[75] There is no direct evidence where Abrahms' numbers on the open economic items came from. Abrahms never revealed the source in his testimony. And Torres testified that he did not know where Abrahms got his numbers from; that there were no discussions with Abrahms prior to the meeting about the specific contract terms the Company would agree to as part of a global resolution (Tr. 2177–2179, 2207–2209). However, Torres' testimony was inherently unbelievable and otherwise exhibited characteristics of false or misleading testimony. See fn. 9, above. See also *Anderson v. City of Bessemer*, 470 U.S. 564, 575 (1985) (variation in a witness' demeanor and voice tone or inflection may justify disbelieving a witness); and *Flamingo Hilton-Laughlin*, 324 NLRB 72, 99 (1997) (discrediting witness whose voice "wilt[ed] to a near-whisper in response to critical questions"), enf. denied in part on other grounds 148 F.3d 1166 (D.C. Cir. 1998). It is therefore reasonable and appropriate to infer that Torres or other Athens executives with decisional authority did, in fact, tell Abrahms prior to the meeting the maximum amounts the Company would agree to on healthcare, retirement, and wages pursuant to a global resolution that included the ratification/rejection concept. See *Ozark Automotive Distributors, Inc. v. NLRB*, 779 F.3d 576, 585 (D.C. Cir. 2015); and *NLRB v. Howell Chevrolet*, 204 F.2d 79, 86 (9th Cir.) affd. 346 U.S. 482 (1953) (where witnesses are discredited, the trier of fact may find, not only that their testimony was untrue, but that the truth is the opposite of their

the four major issues—union security, healthcare, retirement, and wages—Abrahms stated as follows.

Union security. Abrahms said the Company would be okay with the union security clause that had been previously proposed by the Union (GC Exh. 16 (Smith's notes); E. Exh. 31 (Abrahms' notes); Tr. 879–880, 1054–1055.).

Healthcare. Abrahms said that the most the Company would be willing to contribute to the TSIT was $950 in the first year, and $1024 and $1100 in the second and third years.[76] Phillips and Smith responded that they thought $950 would work; that PacFed, the TSIT administrator of the Kaiser healthcare plan, could put together a plan using that number which would be equal to or better than what Athens currently offered its employees. They said they would give the number to PacFed and Kaiser to prepare such a plan. (GC Exh. 16; E. Exh. 31; Tr. 1051–1053, 1072– 1073, 1079–1081, 1230–1233, 2315–2318.)[77]

Retirement. Abrahms said that the most the Company would be willing to contribute to the 401(k) was 2 percent of each employee's gross wages plus a 50 percent match for voluntary employee contributions up to 6 percent of gross earnings. (GC Exh. 16; E. Exh. 31; Tr. 882–883, 2326–2327.)

Wages. Abrahms indicated the maximum total amount the Company would be willing to pay. He, Phillips, and Smith then went through and discussed the amount for each classification one by one. There was some back and forth with respect to a few of the classifications, with Phillips indicating what the Union wanted and Abrahms indicating what he thought the

[76] Both Phillips and Smith testified that Abrahms said he was "authorized to offer" these amounts, as well as the other amounts he said the Company would agree to on retirement and wages (Tr. 996–997, 1049, 1060, 1211, 1214–1218, 1221–1224, 1229–1230.). However, it is unlikely that Abrahms, an experienced labor lawyer and negotiator, would have used such language under the circumstances. As discussed above, the record indicates that his client did not consider the meeting to be a bargaining session or an exchange of proposals and did not want to approve anything until an entire package or global resolution had been prepared and presented. Moreover, this was not the only instance where Phillips put words in Abrahms' mouth. For example, he also repeatedly testified that Abrahms gave him and Smith the Company's "bottom line" numbers. However, on further examination he admitted Abrahms did not actually use the term "bottom line" but said the amounts were the most his client was willing to pay. (Tr. 1049, 1060, 1069, 1215–1218, 1229.). See also fn. 79, below.

[77] Abrahms denied that Phillips and Smith said anything about developing a plan to fit with the $950 contribution amount—that the only thing they said was that they thought the $950 would work but had to check with PacFed—and it was his understanding that they would be checking to see if the $950 would work with the plan that had been previously discussed (Tr. 2317–2318). However, as indicated by the General Counsel, this makes no apparent sense. The previously discussed plan required an employer contribution of over $1200 per month per employee. And there would be no need to check with PacFed and Kaiser to see if the $950 employer contribution rate would work if the employees were going to pay the $250-plus difference. See also Phillips' subsequent January 22 email to PacFed, E. Exh. 10 (requesting pricing matching the attached Athens benefits at the former Recology location").

Company might agree to as long as the total remained the same. (GC Exh. 16; E. Exh. 31; Tr. 888, 1053–1054, 1218–1227, 2323–2326.)

The three of them then discussed various other parts of the global resolution or package. Phillips told Abrahms that he didn't believe the Union would be looking to pursue or move forward on the ULP charges if they reached an agreement. They also discussed the pending decertification petitions and whether and how they could get the petitioners to agree to a ratification/rejection vote as an alternative to a decertification election and withdraw their petitions. Finally, they also briefly discussed how the vote would be conducted, including the location and whether it would be supervised by a neutral arbitrator. They agreed these were issues that needed to be further addressed as the parties moved forward. (E. Exh. 31; Tr. 1056–1059, 1251–1254, 1082, 2328–2330.)

The meeting at that point ended. Abrahms told Phillips and Smith that he would take what they had discussed back to his client. And they all agreed to be in touch. (Tr. 2331, 2349.)[78]

Following the meeting, Phillips contacted PacFed and Kaiser about creating a healthcare plan that would work with a $950 "break-in" employer contribution amount. Unfortunately, it took some time to get the process going, in part because Kaiser (which was also the provider under the Company's healthcare plan), needed certain information and/or authorizations from the Union and the Company to develop rates for the TSIT. The necessary information and authorizations were eventually provided by February 11. (E. Exhs. 10, 32; GC Exhs. 17, 18.)

In the meantime, a number of things occurred that began to erode the Company's interest in reaching a global resolution with the Union. Most significantly, as the weeks passed, the Company received or felt less pressure from the City Council to resolve the disputes with the Union and became less concerned about their impact on the franchise contract. In addition, the Company began getting reports that union business representatives were falsely telling employees that a tentative deal had been reached and they would be voting in a couple weeks. Abrahms texted Herrera on February 7 and 14, saying that he hoped the reports were not true as they were "pushing my folks in the opposite direction" and were "not helpful." Herrera responded saying, "[I] hope they aren't either let me [check] on that." (E. Exh. 13, pp. 5, 8, 10; Tr. 2359–2365, 2368.)[79]

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[78] Smith denied that Abrahms said he had to run everything by his client. However, he also denied, contrary to Abrahms and Phillips, that they discussed the pending ULP charges and decertification petitions. (Tr. 1005.) As for Phillips, he testified that Abrahms said he would take their "agreement" back to his client (Tr. 1060). However, as previously discussed (fn. 77), it is unlikely Abrahms would have used such language under the circumstances. Further, nothing they discussed at the meeting had been put into a written proposal or TA'd. And the General Counsel does not allege that any agreement was reached at the meeting (Tr. 1240, 1424). See also *Heidelberg Distributing Co*., 364 NLRB No. 148, slip op. at 11–15 (2016) (finding, under similar or analogous circumstances, that no agreement had been reached on a global settlement so as to create a binding contract).

[79] I take judicial notice, based on the Los Angeles Sanitation & Environment website (www.lacitysan.org) that Athens and the City executed an amendment to the franchise contract y 25 and March 1, 2019, respectively.

Eventually, on February 21, PacFed emailed Smith and Phillips a description of the TSIT plan that had been prepared using the $950 contribution rate. Herrera emailed Abrahms a copy of the plan summary a few days later, on February 25. The plan matched the Company's current plan with some improvements, including family coverage for all employees and dental, vision, and chiropractic care. However, it was significantly worse than the TSIT plan covering employees at Athens' competitors, which the Union had previously proposed. For example, like Athens' current plan, it provided 70 percent rather than 100 percent hospitalization, and doubled the copay from $15 to $30. (GC Exh. 21; Tr. 1242–1244, 2354.)

The Company was not pleased with the PacFed TSIT plan. Although the plan required the Company to pay $200 more per month per employee than it contributed under its existing plan, it included the same lower hospitalization coverage and higher copay as the existing plan. And while it provided full family coverage to all employees rather than just the drivers, the Company had never had an interest in doing so. Further, the Company's broker advised Pompay that it could provide a plan that likewise included dental and vision to all Athens employees, including the unit employees, for over $100 less ($840). It also orally advised Pompay that removing the approximately 400 unit employees from the current pool could increase the Company's premium for the remaining 1100 Athens employees. Finally, the PacFed plan summary did not indicate what the costs would be in the second and third years, and the Company was concerned that it would get caught in a "bait and switch" with costs rising significantly after the first year. (E. Exh.13, pp. 13–14; E. Exh. 38; Tr. 2355–2358, 2468–2470, 2483–2486.)

Abrahms notified Herrera of these concerns by phone and text after receiving the PacFed summary. He warned Herrera that he was getting "A LOT of push back" from the Company. Herrera responded that he "didn't expect nothing less than push back," wished Abrahms luck, and said to let him know what he needed him to do. (E. Exh. 13, p. 14; Tr. 1282, 1285, 1288, 1353.)

A few weeks later, on March 11, Abrahms called Herrera and informed him that the Company was definitely not going to agree to the PacFed TSIT plan as part of the global resolution for the reasons previously discussed. Abrahms also said the Company was not going to agree to the wage rates that had been discussed on January 11 for some of the classifications; that the Company wanted to reduce them by 10 cents. Abrahms said that he would put the Company's position in writing. Herrera expressed disappointment and suggested another meeting. (Tr. 1288–1294, 1301–1302, 2375–2376, 2425–2427.)[80]

Abrahms met with Herrera and Phillips at the Union's office a few days later, on March 15. He showed them a draft of the Company's "global resolution" proposal and explained to Phillips, as he had previously to Herrera, why the Company would not agree to the PacFed TSIT plan and some of the wage rates they discussed on January 11. He also emailed them a copy of the proposal 2 days later, on March 17. Consistent with the January 11 discussion, the proposal included a union security provision. It also provided that the Company would contribute 2

[80] To the extent Herrera's testimony about the March 11 phone call suggests that Abrahms had made proposals to or reached an agreement with Phillips and Smith at the January 11 meeting, it has not been credited for all the reasons previously discussed (and because Herrera icipate in the meeting).

percent of each employee's gross wages to the 401(k) plan plus a 50 percent match for voluntary employee contributions up to 6 percent of gross earnings. However, it provided that employees would continue to participate in Athens' current healthcare plan on the same basis as the nonunit employees. It also provided for lower wage rates in certain classifications than were discussed on January 11.

The Company's proposal also addressed the remaining parts of the global resolution. With respect to the pending ULP charges and decertification petitions, the proposal stated that they would have to be withdrawn by the Union and the petitioners, respectively. Regarding the combined ratification/rejection vote, the proposal stated that it would be held by secret ballot, on a per yard basis, at neutral locations, and supervised by arbitrators. It further provided that a "yes" vote at a yard would mean the contract would be ratified and the Company would continue to recognize the Union at that location, and that a "no" vote at a yard would mean the Company would withdraw recognition and the Union would disclaim interest in representing the employees at that location. Finally, it also addressed various other details regarding the conduct of the election.

Abrahms' email to Herrera and Phillips stated that the Company's foregoing proposed global resolution was being provided to the Union "for discussion purposes and should be treated as confidential settlement discussions." It further stated that the proposal likely provided the best contract for the unit employees that could be obtained. Finally, it stated that, "barring a global resolution along these lines," Athens would "return to the [bargaining] table with [its] last formal proposal[] and [the parties] can attempt to complete negotiations . . . there." (E. Exh. 11; Tr. 2376–2377, 2428–2429, 2378–2379.)[81]

The Union declined to revisit the contract terms discussed on January 11. Instead, it filed the instant unfair labor practice charge alleging that the Company's March proposal effectively withdrew proposals made by the Company on January 11 and constituted unlawful bad faith regressive bargaining. (Tr. GC Exh. 1(s), (x); E. Exh. 12; Tr. 1248–1250.)

The record evidence, however, fails to establish that the Company actually made any contract proposals on January 11. As indicated above, the discussions between Abrahms and union representatives Phillips and Smith that day were nothing like any of the previous bargaining sessions between the parties. The full bargaining teams did not attend and no written proposals were prepared or exchanged. Further, the discussion of the open contract terms occurred in the context of a global resolution that included a combined ratification/rejection vote and withdrawal of the pending ULP charges and decertification petitions. And Abrahms never stated during the meeting that he had authority to propose or agree to specific terms as part of such a global resolution. Rather, he stated only what he understood to be the most the Company would or might agree to as part of a global resolution and indicated that the Company would have to review and approve whatever they discussed.

In short, as Abrahms testified, the January 11 discussions were "akin to" preliminary litigation settlement discussions where opposing counsel "talk[] about what [their] clients might be willing to do if [they] move closer to one another" (Tr. 2348). See *Universal Stabilization*

[81] The global proposal also included the Company's position with respect to the separate act negotiations.

Technologies, Inc. v. Advanced Bionutrition Corp., 2018 WL 3993369, at *5 (S.D. Cal. Aug. 21, 2018) ("[I]t is often necessary for parties to participate in multiple negotiating sessions before the parties are ready to begin exchanging formal settlement offers."), quoting *In re Gardens Regional Hospital and Medical Center, Inc.*, No. 16-bk-17463-ER, 2017 WL 2889633, at *5 (C.D. Cal. July 6, 2017).[82]

Moreover, even assuming that Abrahms did make contract proposals on behalf of the Company at the January 11 meeting, the evidence fails to establish that the Company unlawfully later withdrew those proposals. The relevant test for evaluating such regressive-bargaining allegations is whether "the totality of the employer's conduct and the circumstances" indicate that its regressive proposals were "made in bad faith or [were] intended to frustrate agreement." *Management & Training Corp.*, 366 NLRB No. 134, slip op. at 4 (2018). Relevant factors include the parties' bargaining history; the timing of the employer's regressive proposals; whether the employer's bargaining position was strengthened or there were changed economic or other circumstances prior to the regressive proposals; the union's own conduct, including whether it likewise made less favorable proposals or failed to make concrete bargaining proposals, before the employer made its regressive proposals; whether and how the employer explained the regressive proposals; whether the employer's explanations were illegitimate, illogical, or unreasonable; and other evidence of the employer's intent. See id., slip op. at 4–5; *Whitesell Corp*., 357 NLRB 1119, 1144, 1149–1150 (2011); *National Steel and Shipbuilding*

[82] The Company also argues for this reason that all of the underlying evidence regarding Abrahms' combined ratification/rejection idea and the global resolution or settlement discussions is inadmissible under FRE 408 (Compromise Offers and Negotiations), citing *Contee Sand & Gravel Co.*, 274 NLRB 574 n. 1 (1985), and *St. George Warehouse, Inc.*, 349 NLRB 870, 872–875 (2007). The Company initially made this argument in a prehearing motion in limine, which I denied on the ground there were material facts in dispute regarding the nature of the parties' discussions following the November 27, 2018 bargaining session. See my July 30, 2019 order (citing *EEOC v. Autozone, Inc*., 2008 WL 5245579 (D. Ariz. Dec. 17, 2008)). The Company also again made the argument in a motion to dismiss at the close of the General Counsel's case in chief, which I denied because the General Counsel had presented testimony that, if credited, would undermine the Company's argument, and I had not had an opportunity to fully evaluate all the supporting emails, text messages, and other exhibits (Tr. 1438–1443). Finally, the Company also again makes the argument in its posthearing brief. And, as discussed above, I have now concluded, after carefully reviewing the entire record, that the parties were engaged in global settlement discussions following the November 27 bargaining session. However, it is not clear that *Contee* and *St. George Warehouse* support the Company's position. In those cases, the complaint allegations that arose from the settlement negotiations (8(a)(5) refusal to execute a new contract and 8(a)(5) surface bargaining, respectively) were closely intertwined with the prior ULP charges the parties were attempting to settle (8(a)(5) failure to abide by the existing contract and 8(a)(5) surface bargaining, respectively). That does not appear to be the situation here. Compare *Cirker's Moving &* Storage Co., 313 NLRB 1318, 1326 (1994); and *Uforma/Shelby Business Forms, Inc. v. NLRB*, 111 F.3d 1284, 1293–1294 (6th Cir. 1997), enfg. in part 320 NLRB 71 (1995) (FRE 408 does not exclude offers or statements made during settlement negotiations to prove liability for an unfair labor practice that is independent of and different than the unfair labor practices that were the subject of the settlement negotiations). In any event, given my finding above that the Company made no proposals at the January 11 meeting, it is y to address the Company's additional FRE 408 argument.

Co., 324 NLRB 1031, 1042 (1997); *Rescar, Inc*., 274 NLRB 1, 2 (1985); *Pipe Line Development Co*., 272 NLRB 48, 49–50 (1984); and *Barry-Wehmiller Co*., 271 NLRB 471 (1984); and cases cited there.

Here, there is no allegation that the Company had not bargained in good faith over the previous year, from November 30, 2017 through November 27, 2018. Further, the history of bargaining during that period indicates that there likely never would have been a January 11 meeting if the Union had not taken the matter to the City Council and the Company had not contacted the Union to explore ways the parties could get past the union security/decertification hurdle that had brought negotiations to a standstill at the November 27 meeting and resolve the Union's pending ULP charges. Absent those initiatives, the parties might never have moved beyond their previous October 31 proposals.

In addition, as discussed above, a number of significant changes or events occurred during the 2 months following the January 11 meeting. First, as the weeks passed and the Company weathered the Union's corporate campaign, it began feeling less pressure to accede to the Union's demands. Second, the Company was informed that union business representatives were falsely telling employees that the Company had in fact acceded to the Union's demands and that the parties had reached a tentative agreement. Third, the Union ultimately provided the Company with an unsatisfactory and incomplete healthcare proposal, the primary open contract issue that had delayed reaching any such agreement following the January 11 meeting. Fourth, the broker for the Company's existing healthcare plan advised that it could provide a plan with dental and vision coverage for over $100 less per month per employee than the cost of the Union's plan and predicted that removing the unit employees from the existing plan would increase the Company's cost for the remaining employees. The record indicates that Herrera was aware of or was specifically told by Abrahms about all of these circumstances and concerns. And, considered in combination, they were not plainly illegitimate, illogical, or unreasonable grounds or reasons for the Company to modify its position.

Finally, there is no other substantial direct or circumstantial record evidence of bad faith or an intent to frustrate agreement. Contrary to the General Counsel, the evidence fails to establish that the Company "engaged in a course of conduct at its yards designed to discourage pro-Union activity and interfere with [their statutory] rights" (Br. 122). Rather, as found above, it establishes only that, over 6 months earlier, at one of the three facilities, the Company had committed a few 8(a)(1) violations due to a miscommunication and misunderstanding and had failed to bargain over the effects of preventing employees from continuing to use the training room for meal breaks.

Accordingly, the allegation will be dismissed.

CONCLUSIONS OF LAW

1. The Company committed unfair labor practices in violation of Section 8(a)(1) of the Act by:

a. Engaging in surveillance and creating the impression that it was engaging in surveillance of its employees' union activities at the Pacoima facility on July 12, 2018.

b. Orally promulgating a rule on July 12, 2018 prohibiting employees at the Pacoima facility from speaking to union representatives off the property while wearing their uniforms.

2. The Company also committed an unfair labor practice in violation of Section 8(a)(5) and (1) of the Act by failing to provide the Union with notice and an opportunity to bargain over the effects of its August 3, 2018 unilateral decision to lock the training room at the Pacoima facility and no longer permit employees to take their breaks there.

3. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

4. The Company did not otherwise violate Section 8(a)(1), (3), and (5) of the Act as alleged in the consolidated complaint.

ORDER[83]

The Respondent, Arakelian Enterprises, Inc. d/b/a Athens Services, Los Angeles, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Engaging in surveillance or creating the impression that it is engaging in surveillance of its employees' union activities.

(b) Promulgating rules that prohibit employees from speaking to union representatives off the property while wearing their uniforms.

(c) Failing and refusing to bargain in good faith with Teamsters Local 396 as the exclusive bargaining representative of its employees in the following bargaining unit:

> All regular full-time and regular part-time Residential Drivers, Frontloader Commercial Drivers, Relief Drivers, Roll Off Drivers, Scout Drivers, Helpers, First Mechanics, Second Mechanics, Third Mechanics, Truck Welders, Bin Welders, Bin Repair Employees, Truck Maintenance Employees, Tiremen, Painters, Parts Clerks, Fuelers, Truck Washers, Yard Support Employees, Transfer Drivers, Dozer Operators, Loader Operators, Yard Operators, Compactor Technicians, Sweepers, Laborer, Sorters and Spotters/Traffic Control Employees employed at the Pacoima facility, but excluding all secretarial, office clerical and sales employees and all managers and guards as defined under the National Labor Relations Act.

[83] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, by the Board and all objections to them shall be deemed waived for all purposes.

(d) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind its July 12, 2018 oral rule prohibiting employees at the Pacoima facility from speaking to union representatives off the property while wearing their uniforms and notify all employees at the facility that it has done so.

(b) On request, bargain in good faith with the Union to an agreement or valid impasse over the effects of its August 3, 2018 decision to lock the training room and no longer permit employees to use the room during their breaks.

(c) Within 14 days after service by the Region, post at its Pacoima facility in Los Angeles, California copies of the attached notice marked "Appendix" in both English and Spanish.[84] Copies of the English and Spanish notices, on forms provided by the Regional Director for Region 31, shall be signed by the Respondent's authorized representative and posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If, during the pendency of this proceeding, the Respondent has gone out of business or closed the Pacoima facility, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at that facility at any time since July 12, 2018.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

It is further ordered that the consolidated complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C., December 30, 2019

Jeffrey D. Wedekind
Administrative Law Judge

[84] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National tions Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT engage in surveillance or create the impression that we are engaging in surveillance of your union activities.

WE WILL NOT promulgate rules that prohibit you from speaking to union representatives off the property while wearing your uniforms.

WE WILL NOT fail and refuse to bargain in good faith with Teamsters Local 396 as the exclusive bargaining representative of our employees in the following bargaining unit:

All regular full-time and regular part-time Residential Drivers, Frontloader Commercial Drivers, Relief Drivers, Roll Off Drivers, Scout Drivers, Helpers, First Mechanics, Second Mechanics, Third Mechanics, Truck Welders, Bin Welders, Bin Repair Employees, Truck Maintenance Employees, Tiremen, Painters, Parts Clerks, Fuelers, Truck Washers, Yard Support Employees, Transfer Drivers, Dozer Operators, Loader Operators, Yard Operators, Compactor Technicians, Sweepers, Laborer, Sorters and Spotters/Traffic Control Employees employed at the Pacoima facility, but excluding all secretarial, office clerical and sales employees and all managers and guards as defined under the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL rescind our July 12, 2018 oral rule prohibiting you from speaking to union representatives off the property while wearing your uniforms and notify all employees at the facility that we have done so.

WE WILL, on request, bargain in good faith with the Union to an agreement or valid impasse over the effects of our August 3, 2018 decision to lock the training room and no longer permit he room during your breaks.

ARAKELIAN ENTERPRISES, INC.,
d/b/a ATHENS SERVICES

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

11150 West Olympic Boulevard, Suite 700, Los Angeles, CA 90064-1824
(310) 235-7352, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at https://www.nlrb.gov/case/31-CA-223801 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (310) 235-7424.

EXHIBIT 2

From: Adam C. Abrahms <AAbrahms@ebglaw.com>
Sent: Thursday, January 9, 2020 9:25 PM
To: Rubin, Mori
Cc: Christina Rentz; Pierce, Danielle M.; Gee, Brian
Subject: RE: Athens 31-RD-223318, 31-RD-223335 and 31-RD-223309

Director Rubin –

We appreciated the prompt acknowledgment of our request we received last week. As it has now been 10 days since Judge Wedekind issued the decision and as the employees are aware of its results, they are very anxious to be given an opportunity to exercise their right to choose which has already been denied for 18 months. Obviously, under the current regulations, had the employees filed their petitions 10 days ago (the date Judge Wedekind's decision issued), they would have already had hearings on those petitions or had stipulated election dates set. Certainly it is not unreasonable for them to expect a similarly expeditious reinstitution of their petitions following the 18 month delay preceding the Judge's decision.

Accordingly, we would respectfully request that you inform us approximately when we should expect to hear from the Region so we may inform the employees. We appreciate your professional courtesy in providing us this information and your anticipated expeditious resumption of the filing of the petitions.

Thank you,

Adam

EPSTEIN
BECKER
GREEN

Adam C. Abrahms | Bio
t 310.557.9559 | f 310.943.3367
AAbrahms@ebglaw.com

1925 Century Park East
Suite 500 | Los Angeles, CA 90067-2506
t 310.556.8861 | www.ebglaw.com
Management Memo Blog

From: Rubin, Mori <Mori.Rubin@nlrb.gov>
Sent: Thursday, January 2, 2020 4:29 PM
To: Stephanie Alvarez <SAlvarez@ebglaw.com>
Cc: Adam C. Abrahms <AAbrahms@ebglaw.com>; Christina Rentz <CRentz@ebglaw.com>; Pierce, Danielle M. <Danielle.Pierce@nlrb.gov>; Gee, Brian <Brian.Gee@nlrb.gov>
Subject: RE: Athens 31-RD-223318, 31-RD-223335 and 31-RD-223309

Thank you. We will review the request and get back to you.

Mori Rubin
(she/her/hers)
Regional Director, Region 31
National Labor Relations Board
11500 W. Olympic Blvd. #600
Los Angeles, CA 90064
(310)307-7306

From: Stephanie Alvarez <SAlvarez@ebglaw.com>
Sent: Thursday, January 2, 2020 4:13 PM
To: Rubin, Mori <Mori.Rubin@nlrb.gov>
Cc: Adam C. Abrahms <AAbrahms@ebglaw.com>; Christina Rentz <CRentz@ebglaw.com>
Subject: Athens 31-RD-223318, 31-RD-223335 and 31-RD-223309

Ms. Rubin,

On behalf of Adam Abrahms please see attached letter regarding removal of block in the following cases: 31-RD-223318, 31-RD-223335 and 31-RD-223309.

EPSTEIN
BECKER
GREEN

Stephanie Alvarez | Legal Secretary
t 310.557.9514 | f 310.553.2165
SAlvarez@ebglaw.com

1925 Century Park East
Suite 500 | Los Angeles, CA 90067-2506
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Attorneys at Law

Adam C. Abrahms
t 310.557.9559
f 310.943.3367
AAbrahms@ebglaw.com

January 2, 2020

VIA EMAIL

Mori Rubin
Regional Director
Region 31
National Labor Relations Board
11500 W Olympic Blvd, Suite 600
Los Angeles, CA 90064-1753

Re: Removal of Block in Cases 31-RD-223318, 31-RD-223335 and 31-RD-223309 Following Disposition of Blocking Charges

Dear Regional Director Rubin:

Please accept this correspondence as Arakelian Enterprises, Inc. d/b/a Athens Services' ("Athens") request to remove the block and resume the processing of the above-referenced petitions (herein referred to collectively as "Decertification Petitions").

As you know, the decertification petitions in the above-referenced matters have been blocked for **nearly 18 months** by the tactical unfair labor practice charges filed by the International Brotherhood of Teamsters Local 396 ("Union") against Athens in NLRB Cases 31-CA-223801, 31-CA-226550, 31-CA-232590 and 31-CA-237885 (collectively "Blocking Charges"). This week, Administrative Law Judge Jeffrey Wedekind issued a decision on those Blocking Charges in which he *completely exonerated* Athens on eight of the eleven allegations, including all retaliatory discipline allegations and the regressive bargaining allegation. Of the three allegations he sustained, Judge Wedekind found two of those allegations were "unintentional," purely technical violations based on a misunderstanding by a low-level manager, and with respect to the third allegation (which alleged a unilateral change), Judge Wedekind found Athens was justified in making the unilateral change without bargaining and merely should have bargained the effects of the change. Most important, each of these three allegations occurred *after* the filing of the Blocking Charges and nothing in Judge Wedekind's 51 page decision even remotely suggests any union animus or any interference with employee free choice.

Notably, Judge Wedekind rejected and dismissed: (1) all allegations related to any conduct pre-dating the petitions, (2) all allegations related to any discipline of any employee, and (3) all allegations related to Athens' Sun Valley (Peoria) or Torrance (LASO) facilities.

In light of Judge Wedekind's decision and his vindication of Athens, as well as the astonishing 18-month delay in processing the decertification petitions, I am writing to request that the Region immediately resume processing the petitions and expeditiously schedule the elections in cases 31-RD-223318, 31-RD-223335 and 31-RD-223309. The Board's Outline of Law and Procedure in Representation Cases, Section 10-800, directs, **"[u]pon final disposition of the unfair labor practice charges, the petition that was held in abeyance will be activated and be processed in the normal manner."** *See also*, NLRB Casehandling Manual (Part Two) Representation Proceedings Sec. 11734 ("Processing of a petition held in abeyance during the pendency of an unfair labor practice may be resumed upon the disposition of the charge.").

Pursuant to the foregoing authority, the block of the Decertification Petitions must be lifted. First, all allegations related to 31-RD-223318 and 31-RD-223335 have been dismissed. There simply is absolutely no basis for any further delay of these petitions.

Second, although Judge Wedekind's decision necessitates a standard notice posting at the location at issue in case 31-RD-223309, his decision shows that the minor, circumstantial events that precipitated these purely technical violations would not affect a free and fair election, *particularly given that these isolated events occurred nearly 18 months ago*.[1]

As we know the Regional Director is aware Section 11730.4 of the Case Handling Manual provides:

> The regional director should assess, throughout the steps of processing the charge and the petition, whether the charge blocks petition… If at any time during *or after* the investigation the regional directors establishes there was no casual relation between the unfair labor practice allegations and the decertification petition, the regional director should not give further consideration to dismissing the petition and should reconsider whether the charge should continue "blocking" the processing of the petition.

Given the evidence produced during the hearing and the Judge's affirmative findings, continuing to delay the elections any amount of time, let alone another two months just to permit a standard notice posting to expire regarding technical non-malicious allegations which post-dated the petitions filing would not be in line with either the Casehandling guidance or spirit of the Act.

[1] Not only do the 8(a)(1) violations ***not*** involve ongoing conduct (but rather, as the Judge Wedekind found, conduct exclusively limited to a single day in July), but Judge Wedekind's decision also does ***not*** require reversal of the
e at issue in the 8(a)(5) allegation as he found Athens had no statutory obligation to bargain over the

Accordingly, it would be both appropriate and prudent to schedule the election in case 31-RD-223309 prior to the expiration of the notice posting period, at or around the same time as the elections in cases 31-RD-223318 and 31-RD-223335.

Indeed, conducting all three elections simultaneously is not only an appropriate exercise of your discretion under the regulations, but would further the purposes of the Act. During the year of bargaining proceeding the hearing on the Blocking Charges, Athens and the Union bargained for a single contract that would cover all three bargaining units implicated in the Decertification Petitions, an arrangement that furthered important logistical and fairness concerns. Athens intends to continue bargaining in good faith for a single contract that covers any and all bargaining units where Athens employees vote to remain in the Union. These negotiations could be frustrated or further delayed by the Region maintaining the block in 31-RD-223309. For example, if the election in 31-RD-223309 is postponed during the notice period while the elections in 31-RD-223318 and 31-RD-223335 proceed without delay, bargaining for those two units in 31-RD-223318 and 31-RD-223335 could be deferred even longer as the parties wait to see if the unit in 31-RD-223309 also votes to remain in the Union. Conducting all three elections simultaneously would avoid such an unfortunate delay in the effectuation of employees' fundamental rights under the Act.

For all of the foregoing reasons we again respectfully request that the Region immediately resume processing of these long delayed Decertification Petitions both so the employees fundamental rights under the Act may be exercised and so the parties can expeditiously continue and resolve their contract negotiations.

Finally, to facilitate the speedy resolution of the minor technical violations Judge Wedekind found in case 31-CA-223801, please promptly send the compliance posting to Cesar Torres, 12303 Montague Street, Pacoima, CA 91331, with a copy to the undersigned.

We thank you in advance for your prompt attention to this matter and in anticipation the Region's expeditious resumption of the Decertification Petition processing. Of course, please do not hesitate to contact me should you wish to discuss this matter further.

Very truly yours,

Adam C. Abrahms

EXHIBIT 3

From: Pierce, Danielle M. <Danielle.Pierce@nlrb.gov>
Sent: Wednesday, February 19, 2020 12:08 PM
To: johnblopez94@gmail.com; pde667@hotmail.com; Julio Porres; Adam C. Abrahms; Christina Rentz; Kat Paterno; Paul More
Cc: Wren, Nayla
Subject: Arakelian Enterprises, Inc. d/b/a Athens Services, Cases 31-RD-223309, 31-RD-223318, and 31-RD-223335

Dear Parties,

After considering the Administrative Law Judge's Decision in Case 31-CA-223801, et al., the exceptions filed in that case, and the parties' positions on continued blocking of the decertification petitions, the Regional Director has decided to take the following actions.

31-RD-223309 (Pacoima) – Continue to block further processing of the petition, pending the Board's decision in Case 31-CA-223801, et al.
31-RD-223318 (Torrance) – Unblock the petition and proceed to an election, if appropriate.
31-RD-223335 (Sun Valley) – Unblock the petition and proceed to an election, if appropriate.

The Regional Director is aware that these petitions were filed approximately nineteen months ago, and that the petitioners are eager to proceed to an election. With respect to the Torrance and Sun Valley facilities, she determined that Exception 2 to the Board's general blocking policy applies. Under the circumstances here, including the length of time that has passed since the conduct alleged to have been unlawful occurred in those units, and the relatively limited nature of the surviving allegations, the Regional Director believes employees could exercise free choice in an election. In reaching this conclusion, she considered the fact that no party has excepted to the ALJ's dismissal of the allegation concerning overall bad faith bargaining toward a first contract. At this time, the Director sees no need to impound the ballots if elections are conducted in the Torrance and Sun Valley bargaining units.

With respect to the Pacoima bargaining unit, the Director believes the conduct underlying the allegations found meritorious by the Administrative Law Judge, together with the conduct underlying the allegations that are the basis for exceptions filed with the Board, is significant and that this unremedied conduct would have a tendency to interfere with employee free choice in an election. Therefore, the Regional Director has concluded that no exception to the blocking policy applies and the petition for the Pacoima unit will remain blocked until the Board issues its decision regarding the exceptions relating to the Pacoima bargaining unit. The Director will reevaluate the status of the blocked petition at that time.

We appreciate the parties' thoughtful responses to our request for your positions on this issue, and we look forward to your continued cooperation as we proceed with processing the Torrance and Sun Valley petitions. To that end, Notices of Hearing will likely issue tomorrow in the Torrance and Sun Valley cases. Board agent Nayla Wren will work with the parties to negotiate stipulated election agreements for those bargaining units. It is our hope that pre-election hearings will be unnecessary.

Thank you,

Danielle Pierce

Supervisory Field Examiner
National Labor Relations Board, Region 31
11500 West Olympic Blvd., Suite 600
Los Angeles, CA 90064
P. 310.307.7302
F. 310.235.7420
danielle.pierce@nlrb.gov

EXHIBIT 4

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH

ARAKELIAN ENTERPRISES, INC., d/b/a ATHENS SERVICES

and

INTERNATIONAL BROTHERHOOD TEAMSTERS, LOCAL 396

Cases 31-CA-223801
31-CA-226550
31-CA-232590
31-CA-237885

RESPONDENT'S POST-HEARING BRIEF

To: Honorable Jeffrey D. Wedekind
Administrative Law Judge
National Labor Relations Board
San Francisco Division of Judges
901 Market Street, Suite 485
San Francisco, CA 94103

Submitted by:

Adam C. Abrahms
Christine C. Rentz
Brock Olson
Epstein Becker & Green, P.C.
1925 Century Park East, Suite 500
Los Angeles, CA 90067
Telephone: (310) 556-8861 |
Email: cemail@ebglaw.com

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I. INTRODUCTION.

This case is a sad example of the Board's procedures being manipulated and abused; despoiling the core purposes of the National Labor Relations Act ("Act") and functioning as a subterfuge to deprive those the Act is designed for (employees) of their most fundamental rights. Specifically, the charges at issue in the Hearing[1] were transparently motivated by Teamsters Local 396's ("Union", "Teamsters" or "Charging Party") desire to block the decertification petitions of employees seeking to exercise their rights under the Act to choose the representative of their choosing under Section 9(c).

As evidenced at the Hearing, Arakelian Enterprises, Inc. d/b/a Athens Services ("Athens", "Company" or "Respondent") was stuck in the middle between the Union and its employees who did not want to be represented by the Union, wanting only to be able to exercise their rights under the Act. The Athens employees were never permitted, and to this day have been deprived of their right, to decide in a secret-ballot election whether or not they want to be represented. Rather, the Union was thrust upon the employees as a result of local labor regulations which had the effect of silencing Athens, preventing any exercise of its 8(c) rights, and imposing the Union through a card check process.

On Athens' part, the evidence was clear that it did its best to remain neutral, adhere to the locally imposed labor regulations, including honoring the card check, and bargain in good faith. The evidence at the Hearing established that all things were progressing as nicely as could be

[1] "Hearing" shall refer to the administrative hearing held before Administrative Law Judge Jeffrey D. Wedekind ("ALJ") on August 6, 7, 8, 9, 12, 13, 14, 15, 16, and 19 regarding the Counsel for the General Counsel's ("General Counsel") Second Consolidated Complaint (GC Ex. 1 (aa)) and the Amendment to the Second Consolidated Complaint (GC Ex. 1(dd))(collectively referred to as "Complaint"). Additionally, the transcript of the Hearing shall be referred to as "Tr., ___", General Counsel Exhibits as "GC Ex. ___", Joint Exhibits and "Jt. Ex. ___ and Employer Exhibits as "Er. Ex. ___".

expected for any first contract negotiations, with no unfair labor practice issues until after the employees filed for decertification at which point the Union filed standard boiler-plate charges designed to block the employees efforts to have a voice and a vote. *See* GC Ex. 1(a).

The Hearing further revealed the Union's motives as the allegations, tactically filed against each of the three locations where it sought to block decertification, each were exposed to be baseless and without credibility.

As detailed below, possibly the most characteristic of the allegations is the Union's disingenuous attempt to prolong the blocking of the decertification petitions by, after the fact, claiming failed settlement discussions to resolve the initial blocking charges were in actuality standalone collective bargaining negotiations and that Athens was regressive when it did not agree to accept the Union's newly designed, and previously undiscussed, healthcare plan. The evidence established that these discussions were in fact settlement discussions and the Union, and General Counsel, fully understood them to be privileged settlement discussions. Moreover, even if they were not, the General Counsel failed to meet their high burden to prove bad faith bargaining.

The General Counsel equally failed to present any credible evidence to establish that the disciplines at issue were motivated by union animus or in any way retaliatory or discriminatory. In fact, for each discipline at issue, the evidence established it was issued in conformance with Athens policy and practice and was legitimately justified based on the employee's infraction.

Finally, the General Counsel's other allegations for various isolated statements or actions are fatally flawed as they were largely based on completely incredulous, and at times impeached and nonsensical, claims. Each of these claims, as detailed below, was fully rebutted by credible testimony and by legal justifications which preclude a finding of any unfair labor practices.

Athens respectfully asks the ALJ, upon review of the detailed analysis provided herein and the supporting record, to dismiss each alleged violation of the Act and the Complaint in its entirety.

II. ATHENS GLOBAL SETTLEMENT DISCUSSIONS DID NOT VIOLATE SECTION 8(A)(5) OF THE ACT.

A. Athens' Business and History.

Athens has been providing waste collection and recycling services in Southern California for over 60 years. Founded in 1957, Athens began as a small family-run business. Athens is still a family-run company today, but it now employs nearly 1,600 employees Companywide and has grown into one of the largest independent (non-national) waste collection companies in the Los Angeles area with a significant percentage of the City of Los Angeles ("City" or "Los Angeles") market share. Tr., 2118:3-5 (Torres); Jt. Ex. 1, No. 1.

B. The Los Angeles City Regulation of Labor Relations and the Labor Peace Agreement.

Waste collection in the City had historically been a competitive open market in which consumers could contract with any hauler they chose to service their waste collection needs. Tr., 2117:19-2118:2 (Torres); Jt. Ex. 1, No. 1. This changed, however, on May 28, 2014, when the City enacted the Franchises for the Collection, Transportation and Processing of Commercial and Multifamily Solid Waste Ordinance ("Franchise Ordinance") following extensive support and lobbying efforts by the Union. Jt. Ex. 1, No. 1; Tr., 2117:19-2118:2 (Torres). The Franchise Ordinance divided the City into 11 waste-hauling zones, and after a bidding process, the City awarded exclusive hauling rights in each zone to seven different trash haulers. *Id.* This constituted a significant threat to Athens' business and market share. Tr., 2118:6-9 (Torres); 2232:1-2233:1 (Abrahms).

In order to continue doing business in the City, all non-union trash haulers had to comply with the Franchise Ordinance's labor relations regulations, including entering into a "labor peace

agreement" with any union that seeks to represent its employees (without any showing of interest). Tr., 2117:19-2118:23 (Torres), 2232:1-2233:1 (Abrahms); Jt. Ex. 1, No. 1. The Union eventually presented such a request to Athens, and thereafter, Athens entered into the Labor Peace Agreement ("LPA") with the Union on June 5, 2015. Jt. Ex. 1, No. 2; Jt. Ex. 2. After entering into the LPA with the Union, the City awarded Athens three different franchise zones enabling it to keep roughly the same amount of business it had before the Union-supported change in law. Tr., 2115:6-14 (Torres); 2232:1-2233:1 (Abrahms).

Athens' work for private consumers within the City is performed out of the three Athens yards: the LANO/Pacoima Yard, the LASO/Torrance Yard and the Sun Valley/Peoria Yard (collectively "LA Yards"). *See* Jt. Ex. 1, No. 3.

In order for Athens to obtain the legally required LPA, the Union insisted on access to the Athens LA Yards and a card check provision which would compel Athens to recognize the Union as its employees' bargaining representative without a secret-ballot election if the Union obtained signed authorization cards from at least 50 percent of the employees at any LA Yard. Jt. Ex1, No.2; Tr., 2233:13-25 (Abrahms). The LPA also contractually required Athens to waive its Section 8(c) rights and remain "neutral" with respect to whether employees should unionize. Jt. Ex.2; Tr., 2233:13-25 (Abrahms).

Again, Athens would not have been able to continue doing business in Los Angeles and would have lost millions of dollars of business from its private customers had it not agreed to enter the LPA. Tr., 2118:13-2119:13 (Torres); Tr., 2232:1-2233:1 (Abrahms).

1. Athens Thoroughly Trained Its Managers, Supervisors, and Employees on the LPA's Neutrality Mandate and Employees' Right to Choose Representation.

Neutrality was a key aspect of the LPA and any neutrality violation could jeopardize Athens' compliance with the City's labor regulations and, with it, a significant share of its business.

Jt. Ex. 1, No.2; Jt. Ex. 2; Tr., 2118:13-2119:13, 2175:2-7 (Torres); 2233:13-21 (Abrahms). To protect its financial interests and ensure strict compliance with the neutrality mandate, Athens educated its managers, supervisors, and employees on its neutrality commitment. Tr., 1849:13-1850:18 (Solis), 1902:6-1903:6 (Naeole) 1995:11-23 (Martinez), 2060:23-2062:2 (Liedelmeyer), 1551:10-1552:25 (Ramirez), 1731:15-1732:14 (Martorana). More specifically, Athens trained its managers and supervisors on what they could and could not do and say with respect to Union matters, and it educated employees on their rights to choose Union representation and Athens' strictly neutral stance. *Id.*

C. With the Help of City Regulation, the Union Organizes Athens' Employees.

On February 14, 2017, per the LPA, Local 396 notified Athens of its intent to organize the employees at the LA Yards. Jt. Ex. 1, No. 3; Jt. Ex. 3. Throughout the organizing, Athens provided the Union with access to its yards and strictly complied with its neutrality commitment. *See* Jt. Ex. 1, No. 2; Jt. Ex.2; *see also* Tr., 2234:1-2235:11 (Abrahms). Seven months later, on September 6, 2017, the Union requested recognition and, following a card check and pursuant to the contractual mandates of the LPA, Athens officially recognized the Union as the exclusive bargaining representative of the three bargaining units on September 28, 2017.[2] Jt. Ex. 1, Nos. 3-7, Jt. Exs. 4-7. On November 30, 2018, Athens and the Union commenced negotiations for an initial collective bargaining agreement, which would cover all three units at the three LA Yards. Jt. Ex. 1, No. 8.

[2] Prior to this date, none of Athens' employees had been represented by any union – with this recognition, approximately 400 of the roughly 1,600 Athens employees became unionized. As of the date of the initial petitions there were 270 employees in the Pacoima Unit, 16 employees in the Peoria Street Unit and 95 employees in the Torrance Unit.

D. Athens and the Union Bargain for a Collective Bargaining Agreement.

The parties bargained for an initial collective bargaining agreement for an entire year, from November 30, 2017 to November 27, 2018. Jt. Ex. 1, No. 8. During this period, the parties conducted 18 in-person formal bargaining sessions, exchanged numerous proposals and executed written tentative agreements on many articles. Jt. Ex. 1, Nos. 8, 10, 13-54; Jt. Ex. 8-51. However, as detailed below, the parties' negotiations broke down over union security because, based on the decertification petitions filed and reports received by Athens, the Union did not have majority support and Athens would not agree to union security without proof of majority support. Tr., 2166:3-5, 2168:4-9, 2168:17-23, 2169:22-2171:16 (Torres); Tr., 2168:14-2170:18 (Abrahms); Er. Ex. 30.

1. The Parties Had a Specific and Formal Bargaining Process.

a. The Ground Rules.

At the first bargaining session, Athens' attorney, Adam Abrahms, set forth the ground rules for the bargaining process. Tr., 2151:22-2154:19 (Torres); 2260:17-2264:9 (Abrahms); Er. Ex. 29 at 1975. Relevant here, Abrahms explained that Athens would present all formal bargaining proposals in writing, and would only propose actual contract language, not conceptual contract provisions. Tr; 2153:10-16 (Torres); 2263:12-23 (Abrahms). Abrahms further stated that any tentative agreement must be in writing, and Athens would only sign written tentative agreements once the parties agreed to an entire contract article, as opposed to piecemeal agreements on sections of one contract provision. Tr., 2154:1-11 (Torres); 2264:4-9 (Abrahms). Finally, Abrahms stated he would act as the Company's Chief Spokesperson, and he instructed the Union to direct all questions to him, but he noted he would confer with Athens' committee to obtain the answer. Tr., 2152:8-16 (Torres); 2261:12-2262:6 (Abrahms).

b. The Parties' Bargaining Committees.

Athens' and the Union's full bargaining teams attended each bargaining session. Jt. Ex. 62; Tr., 2265:8-2266:21 (Abrahms). On Athens side, the bargaining committee consisted of Abrahms and Athens' decision makers – the Vice President of Operations, Cesar Torres, and Athens' Vice President of Human Resources, either Steve Nunez or Michael Pompay.[3] *Id.* Starting in January 2018, Athens also had another attorney attend all bargaining sessions. *Id.*

The Union's bargaining committee consisted of Athens employees from each yard, three to four Union officials, including at most sessions Union President Jay Phillips and Union Business Agent Jim Smith, and, starting in May 2018, a Union attorney (either Joe Kaplon or Elizabeth Rosenfeld) who served as the Chief Negotiator. Jt. Ex. 62; Tr., 2265:8-2266:21 (Abrahms).

Importantly, there was not a single bargaining session that only Abrahms, Phillips and Smith attended. Jt. Ex. 62; Tr., 2265:8-2266:21 (Abrahms). Rather, the Union always had multiple employee representatives from each yard and, starting in May 2018, a Union attorney[4] at every bargaining session. *Id.* Likewise, Athens always had at least one, and most often two, Athens' decision makers present at each bargaining session. *Id*.

c. The Process for Exchanging and Agreeing to Bargaining Proposals.

Consistent with the ground rules, Athens never made any oral bargaining proposals. Jt. Ex.1, Nos. 11-54; Jt. Ex. 11-54; Er. Ex. 29 at 1975; Tr., 2151:22-2158:14 (Torres); 2260:17-2264:9, 2267:7-2269:12 (Abrahms), 2443:2-2244:23 (Pompay). Rather, all Athens proposals were

[3] From February 2018 to April 2018, Athens was in the process of hiring a new Vice President of Human Resources after Steve Nunez left the Company. Accordingly, only Abrahms, Torres, and another Athens' attorney attended the three bargaining sessions that occurred during this period.

[4] Notably, the attorneys who participated in negotiations were different, and from a different firm, than Paul More, the lawyer involved in the unfair labor practice charges and the global settlement discussions.

in writing and exchanged across the table with both parties' full complement of bargaining committee members present. *Id.*

Athens also never agreed to any Union proposal across the table. Jt. Ex.1, Nos. 11-54; Jt. Ex. 11-54; Er. Ex. 29 at 1975; Tr., 2151:22-2158:14 (Torres); 2260:17-2264:9, 2267:7-2269:12 (Abrahms), 2443:2-2244:23 (Pompay); Jt. Ex. 8. Even when the Union presented a proposal that was acceptable without modification, Athens always caucused so that its decision makers – the Vice President of Operations and Vice President of Human Resources – could evaluate the proposal. *Id.* If acceptable without modification and authorized by Athens' decision makers, Athens prepared a written tentative agreement and presented it at the parties' next bargaining session. *Id.* Notably, Cesar Torres signed all written tentative agreements entered into by Athens, and Abrahms never once signed a tentative agreement – and for good reason, as he had no authority to bind Athens to specific proposals. Tr., 2268:24-2269:12 (Abrahms); Jt. Ex. 8.

2. <u>After a Full Year of Bargaining, Athens and the Union Reach Impasse in Collective Bargaining Negotiations.</u>

By November 27, 2018, serious stagnated differences remained in the parties' respective positions on key economic and non-economic items, including *inter alia* union security, health and welfare, and retirement benefits.

a. <u>Union Security.</u>

From the outset of negotiations, the Union proposed a union security clause, and across the table, the Union repeatedly stated it would not agree to any contract without union security. Tr., 2165:17-2167: 7 (Torres); 2293:1-17, 2294:22-23 (Abrahms). Athens, however, consistently rejected this proposal. Tr., 2165:20-22 (Torres); 2287:3-2291:14 (Abrahms). Notably, this was

not just a blustering bargaining position. The Union obtained recognition through a card check,[5] and as Athens articulated across the table, it was unwilling to force employees to join the Union when they had not had an opportunity to vote on Union representation. *Id.* Athens' position was only hardened when employees filed decertification petitions and reported to Athens that the Union did not enjoy majority support. Tr., 2292:16-2293:24; *see also* Er. Ex. 30 at 1982.

b. Retirement Benefits.

With respect to retirement benefits, the Union proposed Athens join the Western Conference of Teamsters Pension Trust Fund. Tr., 2285:5-13 (Abrahms); Jt. Ex. 31 at p. 7; Jt. Ex. 39 at p. 1; Jt. Ex. 41 at p. 1; Jt. Ex. 43 at p. 1; Jt. Ex. 47 at p. 1. Athens, however, repeatedly rejected these proposals, choosing instead to maintain its 401k plan with a generous employer match and discretionary annual employer contribution.[6] Jt. Ex. 32 at p. 7; Jt. Ex. 38 at p. 7; Jt. Ex. 40 at p.7, Jt. Ex. 42 at p. 9; Jt. Ex. 44 at p. 8; Jt. Ex. 48 at p. 8, Jt. Ex. 50 at p.8.

c. Healthcare Benefits.

Throughout negotiations, the Union proposed a specific Union-run health and welfare plan – the Teamsters Sanitation Industry Trust plan that Athens' major competitors participated in ("TSIT Competitor Plan"). Tr., 2158:15-2161:2 (Torres); 2270:23-2275:12 (Abrahms); 2444:24-2448:1 (Pompay); Er. Ex. 7. Across the table, the Union advocated for the TSIT Competitor Plan by touting what it deemed to be the plan's superior benefits compared to Athens' current healthcare plan. *Id.* The Union championed that the TSIT Competitor Plan offered lower co-pays than Athens' current plan, provided full hospitalization coverage while Athens' plan did not, and

[5] The Act does not provide for recognition by card check, and the Board recognizes that card checks are an inferior measure of employees' majority support compared to secret-ballot elections as they are inherently susceptible to fraud and manipulation. 84 Fed. Reg. 39930, 39949-39951, 39958; *Dana Corp.*, 351 NLRB 434 (2007) (*overruled* by *Lamons Gasket*, 357 NLRB 739, 748 (2011)).

[6] While the Union eventually withdrew its pension proposal, it never agreed to Athens' 401k proposal. Tr., 2279:24-2288:2 (Abrahms), 2452:4-19 (Pompay); Jt. Ex. 51.

provided full family coverage to all employees for the same cost whereas under Athens' plan drivers receive free family coverage while other employees received free employee coverage but have to pay co-premiums for full family coverage. *Id.*

As noted, another key point the Union championed across the table was that the TSIT Competitor Plan was the same plan Athens' competitors offered to their employees. Tr., 2158:15-2161:2 (Torres); 2270:23-2275:12 (Abrahms); 2444:24-2448:1 (Pompay); Er. Ex. 7. Thus, Athens' competitors could not lure employees away with the promise of better healthcare, and Athens would be able to better compete with its competitors for qualified applicants. *Id.*

Athens, however, through June 2018, repeatedly rejected the TSIT Competitor Plan. Tr., 2161:12-15, 2216:12-2218:16 (Torres); 2281:12-2284:21, 2358:6-20 (Abrahms); Jt. Ex. 32 at p. 8; Jt. Ex. 34 at pp. 6-7; Jt. Ex. 38 at p. 7; Jt. Ex. 40 at p. 7. As Athens articulated across the table, the Company has a long, proud tradition of providing ***free*** health insurance to ***all*** employees, and the TSIT Competitor Plan would not only increase Athens' healthcare costs, but it would require all employees, for the first time, to contribute hundreds of dollars each month for healthcare. *Id.* Moreover, Athens firmly believed its young and relatively healthy workforce would prefer free healthcare rather than paying hundreds of dollars each month for a plan that offered lower co-pays and free hospitalization, features that only benefit employees who heavily use their healthcare benefits. *Id.*

Moreover, although the TSIT Competitor Plan offered full family coverage at the same cost as individual coverage, Athens had always used its free full family coverage for large truck drivers as a recruitment and retention tool to attract and retain the most qualified and reliable drivers. Tr., 2200:18-2201:15, 2217:1-15 (Torres); 2276:19-25, 2283:3-10 (Abrahms). The TSIT Competitor Plan would take away this valuable and proven recruitment tool by requiring Athens

drivers, for the first time, to pay hundreds of dollars each month for family coverage they currently enjoyed for free. *Id.*

d. <u>Athens Attempts to Bridge the Parties' Gaps on Healthcare and Retirement with a Package Proposal.</u>

On July 2, 2018, in an effort to bridge the parties' differences on healthcare and retirement, Athens proposed two alternatives: (1) maintain the Company's healthcare plan or (2) switch to the TSIT Competitor Plan (with the provisions and contributions proposed by Athens) and "contingent upon the Union agreeing to the employer's retirement proposal." Jt. Ex. 44 at pp. 6-8; 2276:9-2279:7 (Abrahms). Importantly, to accept this proposal, the Union needed to agree to the Company's retirement proposal – a 401k with a discretionary annual contribution and two (2%) percent employer match – and its employer healthcare contribution amounts – a $650 per month employer contribution with employees contributing the remaining premium balance. *Id.*

At the next bargaining session on July 18, 2018, the Union <u>*rejected*</u> Athens' healthcare-retirement package proposal, re-proposing the Union pension and the TSIT Competitor Plan. *See* Jt. Ex. 47 at p. 1; Tr., 2279:8-2280:20 (Abrahms).

Later that day, Athens re-proposed its healthcare-retirement package proposal, again "contingent upon the Union agreeing to the employer's retirement proposal," and for healthcare, a $650 per month employer contribution to the TSIT Competitor Plan with employees contributing the remaining premium balance. *See* Jt. Ex. 48 at pp. 6-8. For retirement, Athens maintained its proposal for a 401k plan with a discretionary annual contribution, but increased its employer match to two and a quarter percent (2.25%). *Id.*

The Union made a counterproposal at the next bargaining session on October 31, 2018. *See* Jt. Ex. 49 at pp. 2-4. Although the Union did not accept Athens' healthcare-retirement package proposal, it withdrew its pension proposal and conceptually agreed to a 401k plan. *Id.* However,

the Union countered Athens' proposed contribution amounts; for retirement, the Union countered with a defined "per-hour" contribution of $2.50 per hour for each employee, and for Union healthcare, the Union proposed the TSIT Competitor Plan with a $1,200 employer contribution and employees covering the remaining premium balance. *Id.*

Later that day, Athens re-proposed an option for the TSIT Competitor Plan "contingent upon the Union agreeing to the employer's retirement proposal," with Athens contributing $700 per month per employee and employees contributing the remaining premium balance with a minimum of $100 per month. *See* Jt. Ex. 50 at pp. 6-8. In this healthcare-retirement package proposal, Athens rejected the Union's defined per-hour contribution and countered with a discretionary annual contribution and a two and one half percent (2.5%) employer match. *Id.*

The Union again ***rejected*** Athens' healthcare-retirement package proposal. For healthcare, the Union countered with an employer contribution to the TSIT Competitor Plan of $1,200 per month with employees contributing the remaining premium balance and, for retirement, the Union countered with a defined $2.00 per-hour contribution. *See* Jt. Ex. 51 at pp. 3-5.

3. Employees at Each LA Yard File a Petition Seeking a Decertification Election.

Nine months after voluntary recognition, in the midst of negotiations, employees in each of the three separate bargaining units initiated decertification proceedings. Jt. Exs. 52-54. On July 6, 2018, Ernesto Calvillo filed a petition to decertify the Union as the exclusive representative of the Pacoima Unit. Jt. Ex. 52. That same day, Julio Porres filed a petition to decertify the Union as the exclusive bargaining representative of the Peoria Unit, and John Lopez filed a petition to decertify the Union as the exclusive bargaining representative of the Torrance Unit. Jt., Ex. 53; Jt.

Ex. 54. However, through a series of tactically timed Blocking Charges,[7] the Union successfully blocked the petitions and the decertification election.

4. <u>After a Full Year of Bargaining, The Blocking Charge Policy Caused Negotiations to Break Down Over Union Security.</u>

The parties' next – and last – bargaining session took place on November 27, 2018. Jt., Ex. 1, No. 8. By this point, the decertification petitions had been pending (and successfully blocked by the Union) for approximately five months, and employees had reported to Athens that a majority of them had signed the petitions, and the Union did not enjoy majority support. Jt. Ex. 52-54; Er. Ex. 30 at 1982; Tr., 2168:4-2170:18 (Torres); 2292:16-2294:9 (Abrahms); 2455:24-2457:11 (Pompay). In light of the Union's bargaining posture that the contract must include union security, Athens began this bargaining session with a frank discussion about union security. *Id.*

During the first session that day, Abrahms read from a prepared script and, across the table, explained that Athens could not agree to union security unless employees had an opportunity to vote in the blocked decertification elections. Jt. Ex. 52-54; Er. Ex. 30 at 1982; Tr., 2168:4-2170:18 (Torres); 2292:16-2294:9 (Abrahms); 2455:24-2457:11 (Pompay). To move things forward, Athens proposed two alternatives: (1) the Union can drop its union security proposal and the parties can continue to negotiate a contract without that provision or (2) the Union can withdraw its blocking charges and allow employees to vote in a decertification election and Athens could consider union security. *Id.* After Abrahms presented these alternatives, the Union asked for a caucus. *Id.*

When the parties reconvened, the Union reacted with palpable hostility to the options laid out by Athens. Tr., 2170:12-18 (Torres); 2456:13-25 (Pompay); 2294:12-2295:17 (Abrahms).

[7] "Blocking Charges" shall refer to the unfair labor practice charges file by the Union in NLRB Case Nos. 31-CA-223801, 31-CA-226550, 31-CA-232590, 31-CA-237885.

The Union threatened to take the dispute to the streets and lobby against Athens with the City of Los Angeles. *Id.* With that, the parties were at impasse and negotiations ceased. Tr., 2170:19-2171:16 (Torres); 2457:1-11, 2295:18-2296:11 (Abrahms).

Since that date, the parties have not exchanged any additional bargaining proposals or held any additional bargaining sessions. Jt. Ex. 50; Jt. Ex. 51; Tr., 2172:2-4 (Torres). Accordingly, Athens' October 31, 2018 proposal was and remains Athens' last proposal[8] – a proposal that was affirmatively rejected by the Union. Jt. Ex. 50; Jt. Ex. 51.

E. Athens and The Union Attempt to Negotiate a Global Settlement Deal.

1. Pressures from the City and the Region Prompt Athens to Explore a Global Settlement with the Union.

After the Union declared impasse, Athens remained steadfast in its position of no union security without an election.[9] Tr., 2302:14-18 (Abrahms). However, two important developments prompted Athens to explore a potential global settlement of all labor issues with the Teamsters. First, true to its word, the Union began (falsely) complaining to the City of Los Angeles that Athens had repudiated the LPA, and it leveraged the Union's unproven Blocking Charges as proof of Athens' alleged LPA violations. Tr., 2118:13-2119:13, 2172:21-2174:15, 2175:2-7, 2177:23-25 (Torres), 2347:2-11 (Abrahms); Jt. Ex. 1, No. 1. These false reports placed Athens' business in the City of Los Angeles in jeopardy as adherence to the City's LPA labor regulations is a condition

[8] As noted above, Athens' last collective bargaining proposal proposed, *inter alia*, an option for Union healthcare with Athens' contributing $700 per month per employee with employees paying the remaining balance and contingent upon the Union accepting Athens' retirement proposal of a 401k with a discretionary annual bonus and a two and one half percent (2.5%) employer match.

[9] Athens had just given a raise in October (with the consent of the Union) so it did not have recruitment or retention concerns and, as the record evidence reflects, Athens did not feel pressure to finalize a collective bargaining agreement with the Union.

of doing business with the City,[10] and the City began pressuring Athens to resolve these issues. *Id.*

Second, in December 2018, Yeerik Moy,[11] the Board agent responsible for investigating the Union's Blocking Charges, informed Athens that the Region intended to issue a complaint on some of the Union's allegations. Tr., 2299:18-2301:10 (Abrahms). By this point, the decertification petitions had been pending for nearly six months, and Athens employees were becoming increasingly frustrated, pressuring the Region to process their petitions by showing up at the Region's office to demonstrate their support for the petitions. *Id.*; Jt. Ex. 1, Nos. 58-60; Jt. Ex. 52-54. To facilitate an expeditious resolution of the Blocking Charges, and in turn allow employees to vote sooner than if the Blocking Charges were litigated, Moy encouraged Athens to settle the allegations. *Id.*

Against this background, Athens authorized Abrahms to approach the Union to discuss whether a global settlement of all outstanding labor issues, including the Blocking Charges, was possible. Tr., 2175:10-19 (Torres); 2302:1-2303-:17 (Abrahms).

2. <u>On January 4, 2019, Herrera and Abrahms Meet to Discuss Potential Global Settlements of all Outstanding Labor Issues.</u>

On January 4, 2019, Abrahms and Herrera met in person to discuss what, if anything, could be done to resolve the outstanding labor issues. Tr., 2302:1-2304:4 (Abrahms). At the lunch meeting, Abrahms and Herrera discussed the issues that the Blocking Charges had caused for Athens with the City and the Union's frustration that it did not have a contract with Athens yet.

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[10] This issue was particularly troublesome for Athens given that Athens was in negotiations for amendments to its franchise with the City of Los Angeles at this time.

[11] Athens requested permission from the General Counsel to have Yeerik Moy testify at the hearing, but the General Counsel denied the Company's request. However, the General Counsel also did not call Moy, and thus, the evidence regarding communications to Moy and Moy's knowledge of the settlement discussions is uncontested.

Tr., 2303:18-2304:4 (Abrahms). With respect to the lack of a contract, Herrera informed Abrahms that the Union could not agree to a contract that did not include union security, and Abrahms responded that Athens would not agree to union security unless employees had an opportunity to vote on Union representation. Tr., 2321:23-2322-12 (Abrahms). With these issues in mind, Abrahms and Herrera brainstormed ideas that would satisfy both parties' concerns. Tr., 2304:10-2305:20 (Abrahms).

Ultimately, Abrahms conceived a unique settlement concept that would not only settle the Blocking Charges and deliver the long overdue decertification election to Athens employees, but would also deliver a contract with union security to the Union if employees voted to remain in the Union. Tr., 2305:15-24, 2308:18-2309:23; 2311:16-2312:20, 2322:22-2323:12 (Abrahms); 2176:21-2179:2 (Torres); 1337:11-1339:15, 1341:21-1342:4, 1343:13-20 (Herrera). The essence of the settlement concept was this: the Union would withdraw its Blocking Charges and the petitioners would withdraw their petitions; after these withdrawals, a draft collective bargaining agreement would be presented to Athens employees and, in a single vote, Athens employees in each bargaining unit would vote to either ratify the contract or decertify the Union. *Id.* If a majority of employees in a given unit voted "yes", the contract would be ratified and the Union would retain its exclusive bargaining representative status at that yard. *Id.* If a majority of employees in a given unit voted "no", the Union would be decertified at that yard. *Id.*

To sweeten the settlement pot, the parties would also settle on a final contract to present to employees at Araco, an independent but related Company whose employees the Union also represents, and have employees vote on ratification at roughly the same time as the decertification-ratification votes at Athens. Er. Ex. 11, 31; Tr., 1048:9-14 (Phillips), 2314:15-2315:2; 2378:21-2381:12 (Abrahms). Notably, Araco negotiations had always proceeded separately from Athens'

negotiations, and negotiations at Araco had not reached impasse like those at Athens. *Id.;* Tr., 1048:9-13 (Phillips). However, after over a year of negotiating, the parties had not yet reached tentative agreements on major contract terms such as wages, retirement, and health and welfare. *Id.* Wrapping the Araco labor issues into the settlement negotiations for Athens would not only strengthen labor peace by settling all labor issues between the Union, Athens and its sister companies, but would also give the Union peace of mind that the same issues that precluded agreement at Athens would not preclude agreement at Araco as well.

Importantly, Herrera admitted under oath that he understood a key aspect of the decertification-ratification concept was the settlement of the Union's Blocking Charges. Tr., 1339:6-9 (Herrera); *see also* 1343:12-16, 1344:2-6, 1338:18-1339:3, 1342:1-5 (Herrera). Herrera did not have the expertise to intelligently discuss the complex procedural aspects resolving the Blocking Charges would entail, so he informed Abrahms those details would involve the Union's attorney, Paul More, who was responsible for issues related to the Blocking Charges. Tr., 1340:16-1342:5, 1344:2-7 (Herrera). However, on the stand, Herrera unequivocally admitted that he understood the resolution of the Blocking Charges was an integral aspect of the global settlement concept conceived by Abrahms:

> Q And so we were trying to find a -- so that – the owners, as I expressed to you, were adamant the blocking had to go away and the decertification had to happen –
>
> A Yeah.

Tr., 1339:6-9 (Herrera).

3. <u>Herrera and Abrahms Present the Decertification-Ratification Concept to Their Respective Decision Makers.</u>

As noted, this settlement concept was quite complex and would require approval from the Union, Athens, the decertification petitioners, and the Region. Tr., 2305:15-24, 2308:18-2309:23;

2311:16-2312:20, 2322:22-2323:12 (Abrahms); 2176:21-2179:2 (Torres); 1337:11-1339:15, 1341:21-1342:4, 1343:13-20 (Herrera). Before these approvals could be sought, many substantive and logistical details still needed to be worked out, including the withdrawal of the Blocking Charges, the withdrawal of the decertification petitions, what the contract presented to employees would look like and how the voting would be conducted. *Id.* Before the parties expended energy working out the details of this concept, Abrahms and Herrera agreed to first present the concept to their respective decision makers to gauge their interest. Tr., 2306:20-2307:7 (Abrahms); 1344:25-1346:20 (Herrera). If there was interest, the parties would continue working on fleshing out the details of the settlement. *Id.*

Herrera communicated the decertification-ratification concept to Jay Phillips and Paul More, and both responded favorably. Tr., 1344:25-1346:20 (Herrera); 2306:20-2307:7 (Abrahms);. Likewise, Abrahms presented the decertification-ratification concept to Athens' decision makers, and after doing so, Athens authorized Abrahms to reconvene with the Union to continue discussing the details of this potential settlement. Tr., 1344:25-1346:20 (Herrera); 2176:21-2179:2 (Torres); 2306:20-2307:7 (Abrahms).

4. <u>Abrahms Informs the Region About the Settlement Discussions.</u>

Before reconvening with the Union, though, Abrahms contacted Board Agent Moy because the decertification-ratification concept would involve the petitioners, and Athens and the Union would need the assistance of the Region to broach this settlement idea with the petitioners. Tr., 2308:8-2309:23 (Abrahms). It also would require the Region's approval of the withdrawal or settlement of the Blocking Charges. *Id.* Moy indicated that the Region would be willing to assist the Union and Athens in approaching the petitioners about this global settlement concept and otherwise help facilitate a global settlement. *Id.*

5. On January 11, 2019, The Parties Meet Again to Further Discuss the Decertification-Ratification Settlement Concept.

The next settlement meeting took place on January 11, 2019 ("January 11 meeting"). Tr., 2309:24-2310:1 (Abrahms). Since this was not a collective bargaining session, none of Athens' decision makers were present and Abrahms did not have another attorney present to take notes. Tr., 2179:3-14, 2181:23-2182:9 (Torres). However, Abrahms took handwritten notes to memorialize the parties' discussions. Er. Ex. 31.

a. Abrahms and Herrera Discuss Withdrawal of the Blocking Charges.

The day started off with a meeting between Abrahms and Herrera. Tr., 2310:12-2312:14, 2345:20-2347:24 (Abrahms); 1348:12-1349:25 (Herrera). At the outset, Abrahms made it abundantly clear that all discussions were explicitly exploratory and hypothetical, and he had no authority to formally propose or agree to anything. *Id.* With this understanding, Herrera and Abrahms discussed the various independent but interlocking parts that this novel settlement concept would entail, including the Union's withdrawal of the Blocking Charges, the petitioners' withdrawal of the decertification petitions, and discussing the potential contract terms to be presented to employees during the vote. *Id.*

b. Abrams, Herrera and Hector Delgado Discuss Potential Settlement Terms For Araco.

Immediately following Abrahms and Herrera's one-on-one discussion, including Abrahms' explanation that he did not have any authority, Herrera invited Hector Delgado, another Union business agent, in so the three of them could discuss potential terms for an Araco CBA as part of the global resolution. Tr., 2314:6-16 (Abrahms); Er. Ex. 31; *see also* Er. Ex. 11, Tr., 2378:21-2381:12 (Abrahms). At this meeting, the parties discussed potential contract terms for such key contract provisions as retirement, wages and health and welfare with the understanding Abrahms would discuss them with the Araco decision makers for their consideration. *Id.*

c. Abrahms, Phillips and Smith Discuss Potential Settlement Terms for Athens.

After meeting with Herrera on the potential Araco terms, Herrera called in Jay Phillips and Jim Smith to discuss with Abrahms the potential substantive Athens contract terms that could be included as part of the decertification-ratification vote concept.[12] Tr., 2314:17-2315:5 (Abrahms). Relevant here, those discussions included union security, healthcare, retirement and wages. Er. Ex. 31; GC Ex. 16; *see also* Er. Ex. 11, Tr., 2378:21-2381:12 (Abrahms). Notably, although Abrahms did not reiterate all the points discussed with Herrera earlier in the day, Abrahms made it clear that all suppositional contract terms had to be approved by Athens' decision makers by using phrases like, "I might be able to push this," "that might work," and "I might be able to convince them of that." Tr., 2320:19-2321:18, 2345:20-2347:24 (Abrahms). Moreover, while Smith and Abrahms took handwritten notes, all discussions were merely verbal conversations with no party presenting any of the hypothetical settlement conditions in writing, as they were just that – hypothetical and subject to further discussions with the decision makers. Er. Ex. 31; GC Ex. 16; Tr., 1049:10-15 (Phillips). Moreover, as Phillips admitted, both parties understood Abrahms would need to seek approval for the contract terms they ultimately settled upon.Tr., 2345:20-2376:24 (Abrahms); 1060:21-1016.3; *see also* Tr., 1348:24-1349:9 (Herrera).

i. Athens Healthcare.

During settlement negotiations, Phillips and Smith insisted that the contract include Union healthcare. Abrahms indicated he ***might*** be able to convince Athens' decision makers to approve $900/month ($200 more per month than Athens' last authorized proposal). Tr., 2315:6-2317:12, 2320:11-2321-7 (Abrahms). When Phillips and Smith pushed back on the $900 monthly contribution, Abrahms said he could float the idea of a $950 monthly employer contribution ($250

[12] Ron Herrera was present for some, but not all, of these discussions.

more per month than Athens' last authorized proposal), but he did not think Athens' decision makers would go any higher than that. *Id.*

Similarly, the Union indicated that it also needed to discuss what it described as a "break-in rate" to see if it could make the $950 work. Tr., 2319:19-2320:3, 2348:21-2349:18 (Abrahms); 1053:2-6 (Phillips); 880:9-25 (Smith). Because the Union did not know if it could accommodate the hypothetical employer healthcare contribution they discussed, Phillips and Smith agreed to evaluate the feasibility of that contribution level before Abrahms presented the settlement package to Athens' decision makers. *Id.*

Importantly, at no point during the healthcare discussions did Phillips or Smith ever mention creating a different plan, and Abrahms reasonably, and necessarily, understood all discussions related to healthcare referred to the TSIT Competitor Plan discussed and focused on during collective bargaining negotiations, which offered lower co-pays than Athens' current plan, full hospitalization coverage and full family coverage for all employees at no additional cost. Tr., 881:3-8 (Smith); 2316:24-2317:12 (Abrahms).

ii. <u>Athens Retirement.</u>

With respect to wages, consistent with their last bargaining proposals, the Union wanted a guaranteed per-hour contribution, while the Company wanted to maintain their discretionary end-of-the-year bonus with a guaranteed match of employees' contribution. Tr., 2326:2-2328:2, 2378:21-2381:12 (Abrahms); Er. Ex. 11, Er. Ex. 31. Ultimately, the parties discussed a 401k plan with a fifty percent (50%) employer match and an employer annual contribution of two percent of an employee's gross wages. *Id.*

iii. <u>Athens Wages and Non-Wage Items.</u>

With respect to wages, the parties went through classification by classification and discussed what numbers they thought might work. Tr., 2323:13-2326:2 (Abrahms); ER. Ex. 31.

For certain classifications, particularly those in which members of the bargaining committee worked, the Union pushed for higher wages than Abrahms suggested, and Abrahms ultimately agreed to take the Union's requested wage rates back to Athens' decision makers. *Id.* On some classifications, Abrahms said that the rates the Union was discussing would not likely be accepted and the parties recalibrated. *Id.*

Likewise, on other non-wage items, the Union insisted on certain things and Abrahms said he would bring it back to the decision makers, but he was fairly certain they would be rejected. Tr., 2328:3-12 (Abrahms); Er. Ex 11, Er. Ex. 31. On some of these items, the Union revised its position as a result of Abrahms' statements, as reflected in Abrahms contemporaneous notes. *Id.* Specifically, the Union changed its position on overtime and holiday pay, and the parties ultimately decided the potential contract term would be what Athens last proposed in bargaining since, based on Abrahms' representation, Athens' decision makers would likely not approve anything else in these areas. *Id.*

iv. <u>The Logistics of the Decertification-Ratification Vote.</u>

After Abrahms, Phillips and Smith discussed the potential contract terms they would present to their respective decision makers, they discussed the logistics of the decertification-ratification. Tr., 1056:10-1058:4 (Phillips); 2328:13-2331:5 (Abrahms); Er. Ex. 31. Both parties wanted to ensure there would be confidence in the integrity of the decertification-ratification vote, and they discussed in what location the vote would be held as well as having an arbitrator facilitate and supervise a secret-ballot election. *Id.*

d. <u>The Region Inquires About the Status of Settlement Negotiations.</u>

After the January 11 meeting, Abrahms contacted Moy to update him on the progress of settlement discussions Tr., 2395:2-2396:9 (Abrahms); Er. Ex. 33. On January 18, 2019, <u>*seven*</u>

days after the January 11 meeting, Moy emailed Abrahms *and the Union's attorney* to inquire about the status of settlement negotiations:

> **I understand that your respective clients might be working toward a potential non-Board settlement over these set of charges.** While that process is underway, please keep in mind that the Region will still review any non-Board settlement submitted to us to ensure it conforms to guidelines set forth in our Memorandum OM 07-27 (attached). This guideline is particularly more stringent once complaint has issued in any matter. Best of luck, and feel free to call me with any questions or further guidance. Best of luck.

Id.

Importantly, and tellingly, More never objected to Moy's characterization of the parties' recent discussions as settlement discussions. *Id.* Rather, by his silence, More effectively conceded that the recent discussions between the parties were settlement discussions.

On February 19, 2019, the Region again contacted Athens about the parties' ongoing settlement discussions:

> Please see attached settlement offer by the Region regarding these three open charges in the Arakelian cases. **As discussed earlier, we understand the parties are in discussion of a possible non-Board settlement.** If a settlement cannot be reached with the Region by the end of the month, the Region is likely to issue an official complaint in this matter by end of the month. **However, our settlement discussion (and non-Board settlement discussions) can of course continue post-issuance of such a complaint.**

Tr., 2396:15-2397:20 (Abrahms); Er. Ex. 34.

From this email, it can reasonably be presumed that the Union was telling the Region through Moy, the same thing Athens was – that the parties were engaged in settlement discussions.

e. The Union Delays Its Response on the Union Healthcare Issue.

As noted above, Abrahms was waiting on a response from the Union as to whether it could accommodate a $950 monthly employer healthcare contribution before presenting the potential global settlement package to Athens' decision makers. However, by January 22, 2019, Abrahms

had not heard from the Union. Er. Ex.13 at p. 5; Tr., 2360:19-2362:7 (Abrahms). Knowing the longer the parties' delayed the more likely the settlement may fall through because one or more impetuses for settlement could disappear, Abrahms asked Herrera about the delay, noting "I don't want my side to lose interest."[13] *Id.*

Shortly thereafter, Smith emailed Abrahms to request that Athens provide an authorization letter that would permit the Union to access the healthcare usage rating information for Athens' employees. Er. Ex 32; Tr., 2349:19-2352:17, 2367:4-12 (Abrahms). Abrahms found such a request strange because he could not see what use the Union would have for such information at this juncture, so he inquired about the purpose of this request to Smith. *Id.* Smith informed Abrahms the Union needed the rating information to evaluate the feasibility of a $950 monthly employer contribution, but he never said anything about creating a new healthcare plan. *Id.* Finding this explanation satisfactory,[14] and not knowing the Union intended to use the information to create an entirely new TSIT plan, Athens provided the authorization. *Id.*

f. Athens Inquires About Reports that the Union Was Telling Employees They Had a Deal.

While waiting for the Union to confirm the feasibility of the settlement package, Athens began receiving troubling reports that the Union told employees the parties had reached a deal and that the employees would be voting on in two weeks. Er. Ex. 13 at p. 8; 2362:25-2366:1, 2367:18-2369:19 (Abrahms). These rumors had the potential to collapse the settlement, and on February 7, 2019, Abrahms expressed this concern to Herrera in a text message. *Id.* In response, Herrera acknowledged the inappropriateness of such conduct. However, the rumors persisted, and

[13] Clearly an experienced negotiator would not be concerned that an employer would lose interest in a collective bargaining proposal. Rather, the reference plainly exemplifies the settlement nature of the discussion.

[14] Given Athens believed its employees were healthier than its competitors, it made sense that understanding the employees' usage rating might enable the TSIT competitors plan to be offered at less than what the Union had previously estimated.

Abrahms texted Herrera again about it. *Id.* As before, Herrera acknowledged these rumors were inaccurate. *Id.*

g. The Union Proffers A Totally New Healthcare Plan to Accommodate the Monthly Employer Contribution Discussed As Part of the Global Settlement.

On February 25, 2019, the Union finally responded[15] to the supposal employer healthcare contribution discussed at the January 11 meeting. GC Ex. 21; Tr., 2353:2-2354:3 (Abrahms). However, the plan the Union presented was drastically different than the TSIT Competitor Plan the parties had been discussing. GC Ex. 21 at p. 2; Er. Ex. 7; Tr., 2354:7-24 (Abrahms); 2466:10-2467:16 (Pompay). Most notably, the new plan did not offer lower co-pays than Athens' current plan or full hospitalization coverage. *Id.* In fact, the plan essentially mirrored the plan Athens already had, but for significantly more money.[16] *Id.*

Nevertheless, Abrahms dutifully presented the new Union healthcare plan, along with the other potential settlement terms, to Athens' decision makers. Tr., 2354:25-2358:2 (Abrahms); 2466:10-2470:22 (Pompay); Er. Ex. 38. In analyzing the new Union healthcare plan, Athens discovered two game-changing facts. *Id.* First, Athens learned it could obtain the same health insurance (including full family coverage for all) for significantly cheaper, and thus, the Union was likely overcharging the Company $100 per month per employee. *Id.* Second, if Athens removed its 400 unionized employees from the Company's group healthcare coverage, it would destabilize the Company's current healthcare plan and drive up the healthcare costs for Athens' remaining 1,200 non-Union employees. *Id.*

[15] It is incredibly telling that in responding the Union never said it was accepting an offer or that the parties had a deal. Rather the nature of the communications confirmed the hypothetical status of the discussions.

[16] The new Union plan offered some additional features Athens' plan did not; most notably, a flat premium for all employees including full family coverage. GC Ex. 21 at p. 2; Er. Ex. 7; Tr., 2357:7-20, 2358:3-21 (Abrahms). However, as noted above, Athens used free family coverage for large truck drivers only as a recruitment and retention tool and did not find this aspect of the plan to be a benefit. *Id.*

h. Abrahms Communicates with Herrera About the Company's Initial Reaction to the New Union Healthcare Plan.

The Company's initial reaction to the new healthcare plan was negative, and Abrahms expressed this to Herrera in a text message, explaining the Company believed the Union healthcare increased its costs too much and was a "bait and switch" since the parties had never discussed this plan before. Er. Ex. 13 at p. 14; Tr., 2369:20-2374:4 (Abrahms). Herrera's response indicated he expected the push back from Athens' decision makers, "Figures. GOOD LUCK!! Let me know what you need me to do." *Id.*

On March 5, 2019, Abrahms texted Herrera again to let him know they would have a firm response on the settlement concept soon, and far from protesting that Athens had already made a firm proposal the Union had accepted, Herrera responded, "I'll keep my fingers cross [fingers crossed emoji]." Er. Ex. 13 at p. 16; Tr., 2374:5-2375:11 (Abrahms).

i. The Region, the Union and Athens Continue to Discuss the Status of Settlement Negotiations.

On March 7, 2019, Moy again emailed Abrahms and More and inquired about the status of settlement negotiations:

> Hi Adam – excuse my delayed response, I've been out of the office sick for the last several days. Given the number of allegations/witnesses, I expect that the General Counsel's case will take about 3-4 days. We are open to a postponement if the Union is in agreement also. **Perhaps a date in June might serve to help all parties, both with trial preparation along with continued negotiations for a possible settlement. How are talks going on that end, is it something still being discussed between the parties.**

Er. Ex. 35; Tr., 2398:1-2401:7 (Abrahms).

Abrahms responded to Moy's email, copying More on his response:

> …As for your other question [regarding settlement] I think there may be one last attempt but we should proceed and just hope for the best.

Id.

As before, More never objected to either Abrahms' or Moy's characterization of the parties' ongoing discussions as settlement discussions.[17] Er. Ex. 35; Tr., 2398:1-2401:7 (Abrahms). Rather, he remained silent and, by doing so, effectively conceded the parties' recent discussions were in fact settlement discussions. *Id.*

On March 12, 2019, Moy, More, and Abrahms participated in a telephonic conference call to discuss the blocking charges and the parties' ongoing settlement discussions. Tr., 2404:2-2406:2 (Abrahms); Er. Ex. 36. During this call, More acknowledged the parties have been engaged in settlement discussions for a "number of months," and "there have been attempts [at settlement] for some time." *Id.*

Finally, on March 13, 2019, Counsel for the General Counsel herself acknowledged the parties had informed the Region they were engaged in ongoing settlement discussions:

> **Yeerik also informed me that there are some ongoing discussions between the parties about potential settlement.** If there are any updates with respect to those discussions or if there is any way in which we can be of assistance, please let me know.

Tr., 2406:15-2407:19 (Abrahms), Er. Ex. 37.

j. Abrahms Presents a Formal Global Settlement Proposal to the Union.

On March 15, 2019, Abrahms met with Phillips and Herrera to discuss Athens' decision on the previously discussed potential settlement terms, and Abrahms explained the reasons why Athens had rejected the new Union healthcare plan and some of the wage rates. Tr., 2375:25-2378:1 (Abrahms).

On March 17, 2019, Athens presented a formal written settlement proposal to the Union, which memorialized what the parties had discussed on January 11, 2019 and March 14, 2019. Er.

[17] Notably, by this date, the last in-person meeting between the parties was the January 11 meeting.

Ex. 11; Tr., 2378:7-2381:12 (Abrahms). The email subject line read, "Settlement Discussions: Athens/Araco/396 Global Resolution," and there were three attachments to the email, a settlement contract for Athens, a settlement contract for Araco and an outline detailing the various points of the global settlement package. *Id.* Each attachment had the following disclaimer in large, capitalized red font highlighted in yellow: "DRAFT FOR DISCUSSION/INFORMATION ONLY." *Id.* In the email transmitting the written settlement offer, Abrahms stated:

> As discussed and promised, attached are draft documents related to a global resolution of all outstanding issues related to the negotiations, ULPs and decertification petitions at both Athens and Araco. Again, these are being provided for discussions purposes and should be treated as confidential settlement discussions…As discussed, barring a global resolution along these lines, both companies will return to the table with their last formal proposals and we can attempt to complete negotiations separately from there.

Id.

The Union did not respond for two weeks. GC Ex. 27. When it did, it did not deny the parties' recent settlement discussion or object to Abrahms' characterization of those discussions. *Id.* In fact, it was not until fifteen days after this email, and after Abrahms pressed for a response to the global settlement package, that the Union, through its attorney Paul More, disingenuously asserted for the first time that the parties' January 11 meeting constituted collective bargaining negotiations. Er. Ex. 12.

k. <u>Abrahms Inquires About the New Blocking Charge Filed by the Union.</u>

On March 14, 2019, the Union filed the blocking charge in NLRB Case No. 31-CA-237885, which alleged Athens engaged in regressive bargaining. As of March 17, 2019, Athens did not have any further details about the new charge; it only knew the Union was alleging bad faith bargaining. Er. Ex. 13 at p. 20; Tr., 2381:16-2383:10 (Abrahms). However, the only

discussions the parties had in the past few months were settlement discussions so Abrahms texted Herrera about the new blocking charge:

> Also I was thinking about your guys new charge and if it focused on our side discussions, in addition to being contrary to the spirit of our discussion, it may put me crossways with the owners and I presume it means you guys will be saying I made firm offers that I could not make.

Id.

In response, Herrera did not object to Abrahms' characterization of the parties' recent discussions, he just merely suggested they talk, "We can talk tomorrow Adam. I'll call you." Er. Ex. 13 at p. 20; Tr., 2381:16-2383:10 (Abrahms).

When they talked on the phone, Abrahms directly told Herrera it was bad faith to use the parties' settlement discussions as the basis for an unfair labor practice charge. Tr., 2383:11-2384:24 (Abrahms). In response, Herrera did not claim that the parties had not been engaged in settlement discussions or claim they were actually engaged in formal collective bargaining negotiations; he merely deflected, pawning it off on the Union's attorney as "lawyers doing lawyer stuff." *Id.*

The foregoing facts demonstrate, after the parties reached impasse on union security (because Athens would not agree to union security with pending decertification petitions), the parties entered into global settlement discussions in an effort to resolve all outstanding labor issues between the Union, Athens and its sister company Araco. All involved parties understood these discussions were settlement discussions, and both admissions from the General Counsel's witnesses and the circumstantial and documented evidence (including admissions from the Union, its counsel and the General Counsel) unequivocally confirm this understanding. Thus, any discussions about substantive contract terms that occurred pursuant to those settlement discussions cannot serve as the basis for an unfair labor practice charge.

F. Legal Analysis.

1. Athens Had No Duty to Bargain with the Union at the January 11 Meeting.

Athens had no duty to bargain with the Union by January 2019, and thus, cannot have engaged in regressive bargaining. The obligation to refrain from regressive bargaining arises from the duty to bargain in good faith, and if an employer has no duty to bargain with a union, it cannot engage in regressive bargaining. *See Quality House of Graphics*, 336 NLRB 497, 515 (2001). Here, the evidence adduced at Hearing shows Athens had no duty to bargain with the Union.

First, Athens did not truly voluntarily recognize the Union; the City of Los Angeles, through the Franchise Ordinance and its own local labor regulations, which conflict with the Act, coerced Athens into agreeing to a LPA that provided for voluntary recognition based on a card check in order to keep doing business in the City of Los Angeles. Second, after recognition under the LPA, employees did not receive notice of the recognition and of the right to file a decertification petition. *Dana Corp.*, 351 NLRB 434 (2007) (*overruled* by *Lamons Gasket*, 357 NLRB 739, 748 (2011); *see also* 84 FR 39930, 39949-39951, 39958.

Third, based on uncontradicted reports Athens received, petitioners at each of the represented yards filed decertification petitions signed by a ***majority*** of the employees in their respective bargaining units. The only reason employees have not been permitted to vote is the Union's tactical campaign to deprive employees of their Section 7 and Section 9(c) rights for well over a year now. Moreover, despite numerous opportunities and clear notice that Athens would not agree to union security without proof of the Union's continued majority support, the Union refused to provide any such proof. There cannot be a duty to bargain where there is objective evidence showing the uncertified Union no longer enjoys majority support, and the only reason the uncertified Union's majority support has not been certified is because the Union has blocked

the election through its Blocking Charges. *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001).

Finally, the National Labor Relations Act does not sanction (and the Board should not permit) recognition by card checks. Indeed, voluntary recognition secured through a card check is not a reliable measure of employees' free choice, "[U]nlike secret ballot elections, card signings are public actions susceptible to group pressure," and employees often sign cards not because they truly desire union representation, but to avoid offending co-workers or "simply to get the person off their back." *Dana Corp., supra*, 351 NLRB at 439; *see also* 84 Red. Reg. 39930, 39949-39951, 39958. Moreover, union card-solicitation campaigns may be accompanied by misinformation about what the card actually represents or a mere lack of information about the card's impact, particularly when, as here, the employer's Section 8(c) rights have been restrained by neutrality restrictions, and it does not therefore discuss the import of unionization or signing an authorization card with its employees. *Dana*, supra, 351 NLRB at 439; *see also* 84 Red. Reg. 39930,39949-39951, 39958 In light of these factors, under circumstances presented here, voluntary recognition by a card check cannot impose a duty to bargain when the employees' have submitted majority decertification petitions seeking to vote on whether they desire Union representation.

2. <u>The Overwhelming Weight of the Evidence Proves the Contract Discussions at the January 11 Meeting Were Inextricably Linked to the Settlement of the Blocking Charges.</u>

The undisputed evidence proves the discussions about substantive contract terms at the January 11 meeting were explicitly tied to settlement of the Union's Blocking Charges and, thus, cannot form the basis of a regressive bargaining charge. It is well-established that discussions about substantive contract terms cannot be used to establish an 8(a)(5) violation when they occur in the context of unfair labor practice settlement negotiations. *Contee Sand & Gravel Co.*, 274 NLRB 574, 574 fn. 1 (1985) (discussions about substantive contract terms that occur during

negotiations to settle an unfair labor practice charge are inadmissible because they are "so closely intertwined with the unfair labor practices then under discussion that they cannot be separated therefrom."); *St. George Warehouse, Inc.*, 349 NLRB No. 84 (2007) (statements inadmissible when made during meetings in which the parties intended to negotiate a contract and settle pending unfair labor practice charges); *see also* Fed. Evid. § 402.

For example, in *Contee Sand & Gravel Co., supra* at 588, the parties' settlement negotiations over unfair labor practice charges also encompassed negotiations for three separate collective bargaining agreements at three separate companies. The union thereafter alleged the companies unlawfully refused to execute the collective bargaining agreements reached during these settlement discussions. *Id.* In dismissing the bad faith bargaining charge, the Board held that where discussions of substantive collective bargaining agreements occur in the context of unfair labor practice settlement negotiations, such discussions, and the proposals made therein, cannot be used as the basis for finding an unfair labor practice. *Id.* at 574, fn. 1.

As detailed below, the overwhelming evidence, which includes admissions by the General Counsel's own witnesses and other undisputed evidence, demonstrates all discussions about substantive contract terms were inextricably tied to settlement of the Blocking Charges. Accordingly, any discussions about substantive contract terms that occurred at the January 11 meeting cannot form the basis of a regressive bargaining violation.

a. <u>Abrahms Testified, Without Contradiction, That the Substantive Contract Discussions Were Contingent Upon the Withdrawal of the Union's Blocking Charges.</u>

Abrahms credibly testified, *<u>without contradiction</u>*,[18] that, on January 4, 2019, he unequivocally communicated to Herrera that the decertification-ratification concept must include

[18] As discussed more fully below, at hearing, Herrera admitted he fully understood resolution of the Blocking Charges was a key aspect of the decertification-ratification concept. Tr., 1339:6-9 ("Q. And so we were trying to find a – so

resolution of the Union's Blocking Charges. Tr., 2305:15-21 ("Q. Okay. You – did you make clear to Mr. Herrera that this [decertification-ratification] concept you had come up with would involve withdrawal of the unfair labor practice charges. A. Absolutely."); *see also* Tr., 2303:11-2304:4, 2304:7-16 (Abrahms). Abrahms also testified, ***again without contradiction***,[19] that when he met with Herrera alone at the start of the January 11 meeting, he reiterated the decertification-ratification concept must include the withdrawal of the Blocking Charges. Tr., 2311:13-2312:14 (Abrahms).

Then, when discussing the logistical aspects of the decertification-ratification concept with Phillips at the January 11 meeting, Abrahms again stated that, before the concept could be implemented, the Union would need to withdraw its Blocking Charges. Tr., 1056:10-1058:4 (Phillips); 2328:13-2331:5 (Abrahms); Er. Ex. 31. Importantly, not only do Abrahms handwritten notes from that day confirm his testimony, but Phillips conceded this point on cross examination:

> **I think there was a brief discussion on how we envisioned what would happen with the pending Board charges**…. I couldn't tell you word for word what was said, but what was said was what I just said a few minutes ago, where **Ron Herrera and myself would be okay with withdrawing charges in view of the fact that we had an agreement that we were extremely optimistic was going to be ratified.**

Tr., 1056:18-1058:4 (Phillips).

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that – the owners, as I expressed to you, were adamant the blocking had to go away and the decertification had to happen. A. Yeah.")

[19] At the hearing, Herrera did not deny these conversations; he merely stated that he did not recall such discussions. Tr., 1351:5-7 (Herrera). It is well established that "a professed lack of recollection does not suffice as a rebuttal to detailed and specific testimony. *Atelier Condo*, 361 NLRB 996, 989-990 (2014). Further, as noted, Herrera's subsequent text messages made clear he understood Athens needed to consider and approve the potential terms discussed at the meeting.

b. Herrera Admitted He Understood All Discussions About Substantive Contract Terms Were Tied to the Settlement of Blocking Charges.

Consistent with Abrahms' testimony, at the Hearing, Herrera repeatedly admitted the parties' conceived the decertification-ratification concept, *inter alia*, as a way to resolve the Blocking Charges. Tr. 1339:6-9 (Herrera); *see also* Tr., 1343:12-16, 1344:2-6, 1338:18-1339:3, 1342:1-5 (Herrera). Herrera also admitted the January 11 meeting occurred under the auspice of the decertification-ratification concept and all discussions that day were in furtherance of this settlement concept. Tr., 1351:13-1352:3, 1395:16-23, 1399:3-19 (Herrera). Thus, the Union knew full well that all substantive contract discussions at the January 11 meeting were inextricably linked to a global settlement concept explicitly conditioned on the settlement of the Blocking Charges. Tr., 1339:6-9 (Herrera); *see also* 1343:12-16, 1344:2-6, 1338:18-1339:3, 1342:1-5 (Herrera).

To downplay the import of Herrera's repeated admissions, which perfectly support Abrahms' testimony, the General Counsel will likely focus on Herrera's testimony that he directed Abrahms to discuss the procedural logistics of settling the Blocking Charges with Paul More, the Union's attorney.[20] However, this does not prove the Union did not know that the substantive contract discussions at the January 11 meeting were in furtherance of a global settlement concept that included the withdrawal of the Union's Blocking Charges. To the contrary, even if Herrera did not fully understand the procedural aspects involved in resolving the Blocking Charges, he certainly and admittedly understood Athens' entire impetus for exploring the decertification-ratification concept, and engaging in contract discussions at the January 11 meeting, was the resolution of those Blocking Charges.

[20] The mere fact that Herrera referred issues related to these discussions to More, who was handling the Blocking Charges, and not to Kaplan or Rosenfeld who handled the standard collective bargaining negotiations, is further evidence that the discussions were inextricably tied to settlement of the Blocking Charges. *See* Jt. Ex. 62.

c. Phillips' Claim That He Did Not Understand the Contract Discussions Were Contingent Upon the Withdrawal of the Blocking Charges is Directly Contradicted by Both Abrahms and Herrera.

Phillips' testimony that he did not understand the contract discussions were contingent upon the settlement of the Blocking charges is not credible. First, Phillips claimed that he had no knowledge of a decertification-ratification concept prior to January 11, 2019. Tr., 1194:1-1195:1, 1196:11-16 (Phillips). However, this testimony is directly contradicted by Herrera, who unequivocally testified that he discussed the decertification-ratification concept with both Phillips and More prior to the January 11 meeting. Tr., 2306:20-2307:7 (Abrahms); 1344:25-1346:20 (Herrera). Then, on cross, Phillips admitted that, prior to January 11, he discussed under what conditions the Union would be amenable to withdrawing the blocking charges. Tr., 1195:2-14 ("A. Ron and I discussed the benefits and detriments of withdrawing the charges. We discussed that we would withdraw them under certain conditions…and I was okay with that if we -- if we achieved certain goals. Q. Prior to January 11, 2019? A. Yeah."). The most reasonable and probable inference from Phillips' and Herrera's testimony is that Herrera informed Phillips about the decertification-ratification settlement concept, and after he did, Phillips and Herrera discussed what the settlement would need to include before the Union would withdraw the Blocking Charges. Thus, Philips, and Herrera, understood the January 11 meeting was for settlement purposes.

Finally, Phillips admits he discussed the Blocking Charges with Abrahms at the January 11 meeting. Tr., 1056:18-1058:25 (Phillips). Although he claimed not to recall the details of those discussions at the Hearing, common sense dictates that the only reason Abrahms would discuss the Blocking Charges with Phillips is because settlement of those charges was inextricably a part of the discussions. Indeed, this is precisely what Abrahms' handwritten notes reflect and what Abrahms, who had a clear memory of this discussion, testified to. Er. Ex. 31.

In any event, whether or not Phillips personally understood the substantive contract discussions at the January 11 meeting were contingent upon, *inter alia*, the withdrawal of the Blocking Charges is irrelevant because Herrera admittedly did. Tr., 1339:6-9 (Herrera); *see also* 1343:12-16, 1344:206, 1338:18-1339:3; 1342:1-5 (Herrera). Herrera is the principal officer of the Union, and his knowledge of the decertification-ratification concept, including the Blocking Charge withdrawal contingency, is imputed to the Union. Tr., 1088:22-1089:3 (Phillips); 1266:8-19 (Herrera). *See Caravan Knight Facilities Management, Inc.*, 362 NLRB 1802, 1084 (2015). Athens is not required to separately inform all Union officers about the decertification-ratification concept when it already informed the Union's highest-ranking officer.

d. <u>Pressure from the City of Los Angeles and the Region About the Blocking Charges Prompted Athens to Explore Settlement with the Union.</u>

As noted above, contract negotiations reached impasse after Athens informed the Union it would not agree to a contract with union security unless employees had an opportunity to vote in the long overdue decertification election. After negotiations broke down, the Union complained to the City of Los Angeles that Athens violated the LPA, which was a condition of doing business with the City, and used the Blocking Charges as proof of Athens' violations. Tr., 2118:13-2119:13, 2172:21-2174:15, 2175:2-7, 2177:23-25 (Torres); 2347:2-24 (Abrahms); 2457:16-2459:18 (Pompay); Jt. Ex. 1, No. 1. At the same time, the Region had decided to issue a complaint on some of the Union's allegations, and under pressure from the petitioners about the unreasonable delay in the election, the Region encouraged Athens to settle the Blocking Charges. Tr., 2299:18-2301:10 (Abrahms). Three witnesses credibly, without contradiction, testified that it was these outside pressures about the Blocking Charges that prompted Athens to approach the Union about a path forward. Tr., 2118:13-2119:13, 2172:21-2174:15, 2175:2-7, 2177:23-25 (Torres); 2347:2-24 (Abrahms); 2457:16-2459:18 (Pompay); Jt. Ex. 1, No. 1. The evidence is absolutely clear that

Athens explicitly and unambiguously conditioned all discussions on settlement of the Blocking Charges.

Notwithstanding the overwhelming evidence, the General Counsel presents a completely nonsensical and unsupported theory. Under the General Counsel's theory, Athens suddenly, and without reason, reversed its position on union security because it was so eager to get a contract with the Union. However, the General Counsel presented no credible evidence to support this theory. To the contrary, all credible and undisputed evidence shows that Athens only engaged in the January 11 meeting because it sought to settle the Blocking Charges.

e. <u>The Settlement Negotiations Have None of the Earmarks of the Parties' Previous Negotiations.</u>

The January 11 meeting had none of the earmarks of the parties' previous negotiations, nor did they conform to the established ground rules. When Abrahms allegedly made these proposals that were later allegedly withdrawn, only Abrahms, Phillips and Smith were present. However, the parties engaged in collective bargaining negotiations for over a year, and there was not a single bargaining session at which the parties' full bargaining teams were not present. Jt. Ex. 62; 2265:8-2266:21 (Abrahms). Rather, at each negotiation session, the Union had a bargaining team consisting of employee representatives from each yard, 3-4 Union representatives, and starting in May, a Union attorney who served as the Chief Negotiator. *Id.*

Likewise, there was not a single bargaining session that only Abrahms attended. Jt. Ex. 62; Tr., 2265:8-2266:21 (Abrahms). Instead, Cesar Torres, Athens' Vice President of Operations, attended each bargaining session, and for the majority of bargaining sessions, Athens' Chief Human Resource Officer also attended the bargaining sessions. *Id.* Starting in January 2018, Athens also had another attorney attend all bargaining sessions. *Id.*

In addition to the bargaining committees' conspicuous absence, the parties did not follow their typical and agreed upon bargaining process of exchanging written proposals and executing written tentative agreements. Jt. Ex. 1, Nos 11-54; Jt. Ex. 11-54; Er. Ex. 29 at 1975; Tr., 2151:22-2158:14 (Torres), 2260:17-2264:9, 2267:7-2269:12 (Abrahms), 2443:3-2244:23 (Pompay). As noted above, pursuant to the ground rules established at the start of negotiations, Athens always only made written bargaining proposals, and one of its decision makers was always present when such proposals were made. *Id.* This was not the case at the January 11 meeting. Likewise, although Phillips and Smith repeatedly testified that the parties reached agreement on multiple items, the parties did not execute a written tentative agreement at the end of the meeting.

Importantly, the General Counsel did not proffer a single credible reason why these meetings, which occurred after negotiations reached impasse, were different than the parties' previous negotiation sessions. If, as the General Counsel contends, the January 11 meeting was an official collective bargaining session, there would presumably be a reason why the parties did not follow their typical and agreed upon bargaining process. The only credible reason presented at Hearing was that these were settlement discussions, not collective bargaining negotiations. In light of the General Counsel's failure to proffer an alternate explanation, this constitutes powerful persuasive circumstantial evidence that the discussions at the January 11 meeting were, in fact, settlement negotiations.

f. <u>The Settlement Negotiations Included Discussions About Araco's Contract.</u>

The fact that the parties also discussed the potential Araco contract at the January 11 meeting is further proof this meeting was, in fact, a settlement discussion. Araco contract negotiations had always been conducted completely separate from Athens contract negotiations, but the parties decided to include Araco in the settlement to enhance the overall settlement package

by furthering labor peace between the Union, Athens and a related company and by ensuring the same issues that precluded agreement at Athens would not preclude agreement at Araco. Tr., 2314:6-16 (Abrahms); Er. Ex. 31, *see also* Er. Ex. 11, Tr., 2378:21-2381:12 (Abrahms); 1048:9-15 (Phillips).

The General Counsel may argue that the parties' discussions about the Araco contract on the same day proves the parties were engaged in collective bargaining negotiations because there were no unfair labor practice charges pending at Araco. However, as noted, the discussions related to Araco looked nothing like the parties' typical bargaining process for Araco, which had always been done on a different day, at a different location and with different bargaining teams than Athens negotiations. Tr., 1048: 9-13 (Phillips). The General Counsel proffered no explanation for this drastic departure from established practice. Rather, the only explanation in the record for this drastic change in process was that the parties were engaged in settlement discussions, not collective bargaining negotiations.

g. <u>The Union Did Not Disclaim Abrahms' Email Transmitting the Formal Written Settlement Proposal.</u>

When Abrahms transmitted the formal written settlement proposal to the Union, the Union did not disclaim Abrahms' characterization of the parties' recent discussions or express confusion about why Abrahms would send a settlement offer when the parties had already reached a collective bargaining agreement at both Athens and Araco. Er. Ex. 11; Tr., 2378:7-2381:12 (Abrahms). Indeed, the Union did not even respond to Abrahms' email for fifteen days, and it only did so after Abrahms pressed for an answer. GC Ex. 27. Obviously, had the Union genuinely believed the parties were already in agreement at Athens and Araco, or made firm proposals, at the very least, it surely would have promptly questioned Abrahms' email. Its unexplained failure

to do so provides compelling evidence that the Union fully understood the parties had not reached an agreement or exchanged firm bargaining proposals at the January 11 meeting.

Equally compelling, the General Counsel failed to proffer evidence to explain this email. First, the General Counsel's witnesses failed to explain why they did not immediately object to Abrahms' email. Er. Ex. 11; Tr., 2378:7-2381:12 (Abrahms), GC Ex. 27. Second, his email clearly conveys the attachments were a product of the parties discussions. *Id.* Based on the record evidence, the only discussions the parties had about potential contract terms after reaching impasse, and thus the only discussions the email could possibly be referring to, are those that occurred at the January 11 meeting.

h. <u>Communications With The Region Further Demonstrate The January 11 Meeting Was a Settlement Negotiation.</u>

The Union repeatedly conceded the settlement nature of the parties' discussion in communications with the Region. As detailed above, Abrahms characterized the 2019 discussions as settlement discussions multiple times in his communications with the Union and the Region, and the Union never once objected to this characterization. Tr., 2395:2-2396:9 (Abrahms); Er. Ex. 33; Tr., 2396:15-2397:20 (Abrahms); Er. Ex. 34; Er. Ex. 35; Tr., 2398:1-2401:7 (Abrahms). In fact, in a teleconference between Athens, the Region and the Union, the Union affirmatively represented that the parties had been in settlement negotiations for months. Tr., 2404:2-2406:2 (Abrahms); Er. Ex. 36. It was only after Athens rejected the Union's new healthcare plan as part of the settlement that the Union began claiming those discussions were collective bargaining negotiations. Tr., 2375:25-2378L1 (Abrahms); Er. Ex. 11; Tr., 2378:7-2381:12 (Abrahms); Er. Ex. 12.

Importantly, after Abrahms testified, the General Counsel took a recess to confer with the Union. Tr.,2408:306 (General Counsel). After doing so, neither the General Counsel nor the

Union called More or Moy to rebut Abrahms' testimony, nor did the General Counsel or the Union proffer any other rebuttal evidence to explain why the Union did not object to Abrahms' characterization of the parties' discussions as settlement discussions or why the Union itself affirmatively characterized those discussions as settlement discussions. The reasonable and most plausible inference from the General Counsel's failure to present rebuttable evidence on this issue is that the Union knew those discussions were, in fact, settlement discussions. *Government Employees (IBPO)*, 327 NLRB 676, 699 (1999); *Vigo Industrial, LLC*, 363 NLRB No. 70, slip op. at 5 (2015). Moreover, the fact neither the Union nor the General Counsel called Paul More to testify must result in affirmative adverse inference against them that the testimony and documents, which establish the Union's discussions with Athens, including those at the January 11 meeting, were in fact and admittedly settlement discussions. *Government Employees* (IBPO), supra at 669, *Vigo Industrial, LLC*, supra, slip. op. at 5.

The General Counsel will undoubtedly argue that the mere fact the parties informed the Region they were engaged in settlement discussions does not heretofore mean the January 11 meeting was, in fact, a settlement discussion. While this is true, unless the General Counsel contends the parties were lying to the Region, the parties must have been engaged in some settlement discussion if they represented that to the Region. In fact, as noted above, the Union's own counsel admitted that the discussions were settlement discussions. Based on the record evidence, the only settlement discussions that occurred during this time period are the ones that occurred on January 4 and January 11, 2019. Thus, these communications are further proof that the parties were engaged in settlement discussions during the January 11 meeting.

At Hearing, the General Counsel also intimated that the January 11 meeting cannot properly be considered settlement discussions because the regressive bargaining charge was not

pending at the time of those discussions. This contention is both contradicted by controlling case law and illogical. In *Contee Sand & Gravel Co., supra,* the General Counsel also brought a bad faith bargaining charge based on the employer's failure to execute a collective bargaining agreement negotiated during settlement discussions. *Id.* at 574, fn. 1, 588-589. The General Counsel argued that evidence could be relied upon for a 8(a)(5) violation because it "was not offered to prove the validity of a claim which was being discussed during these negotiations." *Id.* The Board, however, flatly rejected this contention, finding "the alleged new collective-bargaining agreements were so closely intertwined with the unfair labor practices then under discussion that they cannot be separated therefrom." *Id.*

Indeed, under the General Counsel's flawed theory, collective bargaining issues discussed during settlement negotiations could always serve as the basis for a regressive bargaining charge anytime the settlement is not accomplished. This result would, of course, swallow the rule and discourage parties from mutually resolving their labor issues.

3. <u>Abrahms Did Not Have Apparent Authority to Agree to Substantive Contract Terms on January 11, 2019.</u>

The evidence shows Abrahms did not have apparent authority to make formal bargaining proposals at the January 11 meeting. The Board applies common law principles to determine whether an individual possesses apparent authority to act for an employer:

> Apparent authority results from a manifestation by the principal to a third party that creates a reasonable belief that the principal has authorized the alleged agent to perform the acts in question. [citations] Either the principal must intend to cause the third person to believe the agent is authorized to act for him, or the principal should realize that its conduct is likely to create such a belief. [¶] The Board's test for determining whether an employee is an agent of the employer is whether, under all of the circumstances, employees would reasonably believe that the employee in question was reflecting company policy and speaking for management.

Comau, Inc., 358 NLRB 593, 595 (2012) quoting *Pan-Oston Co.*, *supra* 336 NLRB at 305-306. Moreover, in the context of collective bargaining negotiations, the Board has held that the mere fact an individual serves as the chief negotiator does not confer apparent authority to bind the employer where the union clearly has notice that the employer must approve all negotiated terms. *Aptos Seascape Corp.*, 194 NLRB 540, 544 (1971).

First, as noted above, the parties established clear ground rules regarding negotiations in November 2017. Tr., 2151:22-2154:19 (Torres), 2260:17-2264:9 (Abrahms); Er. Ex. 29 at 1975. Among these were the clearly communicated understanding that while Abrahms was the chief spokesperson, Athens would derive the answers to any questions or proposals from the Athens decision makers. *Id.* To make the limited authority even more clear, Athens proposed, and the Union agreed that all proposals would be presented in writing, with actual proposed language. *Id.* In so establishing, Athens made clear no proposal was valid unless it was in writing as agreed in the ground rules. *Id.*; Jt. Ex. 9-51. Likewise, nothing was tentatively agreed upon unless in writing and signed by an Athens executive. *Id.*; Jt. Ex. 8. Under these circumstances, there is no way the union could believe Abrahms was authorized to unilaterally make oral proposals or agree to anything.

Moreover, as detailed below, not only did the circumstances clearly convey Abrahms' limited authority at the January 11 meeting, but Abrahms unequivocally communicated the extent of his authority to Herrera, and Herrera admittedly understood Athens would have to approve any potential contract terms discussed at this meeting. Tr., 1348:24-1349:9, 1351:13-1352:3, 1395:16-23, 1399:3-19 (Herrera); 2345:20-2376:24 (Abrahms). Although Phillips and Smith testified they did not understand Abrahms' limited authority, this testimony is both irrelevant, in light of Herrera's knowledge, and contradicted by Abrahms' specific, detailed, and unequivocal testimony,

which is far more credible than their conclusory, non-specific testimony and general denials. *Atelier Condo*, 361 NLRB 966, 989-990.

a. Abrahms Informed Herrera on January 11, 2019 That He Had No Authority to Exceed Athens' Formal Proposal on October 31, 2018.

It is ***undisputed*** that Abrahms started the January 11 meeting by explaining to Herrera all discussions were exploratory and hypothetical, and he had no authority to offer anything more than the Company's last bargaining proposal. Tr., 1351:20-22 (Herrera); 2311:13-2312:14 (Abrahms); *see also Atelier Condo, supra,* at 989-990 ("a professed lack of recollection does not suffice as a rebuttal to detailed and specific testimony.") Indeed, Herrera admitted under oath that he understood Abrahms would need to seek approval from Athens' decision makers on the items discussed during the January 11, 2019 meeting. Tr., 1351:23-1352:3 (Herrera). As the highest ranking (principal) officer of the Union, Herrera's knowledge is imputed onto the Union, and the mere fact that other Union officers (*i.e.,* Phillips and Smith) allegedly now claim they did not understand the settlement nature of these discussions does not overcome the knowledge the Union had through Herrera. *Woodlawn Hosp.*, 274 NLRB 796, 798 (1985) ("It is hornbook law that 'the knowledge of an agent is imputed onto his principal'); *Caravan Knight Facilities Management, Inc.*, 362 NLRB 1802, 1084 (an elected or appointed union official is the agent of the union absent compelling evidence to the contrary).

i. Text Messages Between Abrahms and Herrera Confirm Athens Had Not Made Any Firm Bargaining Proposals at the January 11 Meeting.

The text messages between Herrera and Abrahms provide further proof that the Union fully understood Abrahms had not made binding bargaining proposals at the January 11 meeting. Er. Ex. 13 at pp. 5, 8; Er. Ex. 36; Er. Ex. 37; Tr., 2360:19-2362:7; ; 2362:25-2366:1, 2367:18-2369:19, 2404:2-2406:2; 2406:15-2407:19 (Abrahms). More specifically, in those text messages, Abrahms

repeatedly indicated that Athens had never made a binding proposal to the Union, and Herrera never once objected. To the contrary, all of Herrera's responses indicate that he, in fact, expected adjustments to be made after Abrahms presented the settlement contract terms to Athens' decision makers.

For example, when Abrahms explained Athens' negative initial reaction to the new Union healthcare plan, Herrera responded that he expected push back. Er. Ex. 13 at p. 14; Tr., 2369:20-2374:4 (Abrahms); *see also* Er. Ex. 13 at p. 16; Tr., 2374:5-2375:11 (Abrahms). Likewise, when Abrahms contacted Herrera about rumors the Union told employees the parties had reached a deal, Herrera's responses indicated he agreed the parties had no deal. Er. Ex. 13 at p. 8; Tr., 2362:25-2366:1, 2367:18-2369:19 (Abrahms). Indeed, even after the regressive bargaining charge had been filed, when Abrahms directly confronted Herrera about filing a charge based on settlement discussions, Herrera did not refute Abrahms' claims. He just deflected, claiming ignorance and pawning it off as "lawyers doing lawyers' stuff." Er. Ex. 13 at p. 20; Tr.2383:11-2384:24 (Abrahms).

Coupled with Herrera's failure to deny Abrahms' testimony that Abrahms informed Herrera about his lack of authority, and Herrera's admission that he knew Abrahms would need to seek approval from Athens' decision makers, this evidence unquestionably demonstrates the Union understood full well no firm proposals had been made and the parties were engaged in non-binding settlement negotiations.

b. <u>The Parties' Bargaining History Gave the Union Clear Notice that Abrahms Did Not Have Singular Authority to Make Binding Bargaining Proposals.</u>

Not only does the undisputed evidence prove Abrahms informed Herrera of his limited authority, but the parties' established bargaining process dispels any notion of apparent authority. At least one, and most often two, Athens' executives attended every single bargaining session with

Abrahms, and all bargaining proposals were exchanged, in writing, across the table with both parties' full bargaining teams present. Jt. Ex. 1, Nos. 11-54; Jt. Ex. 11-54; Er. Ex. 29 at 1975; Jt. Ex. 62; Tr., 2151:22-5158:14 (Torres); 2260:17-2264:9; 2265:8-2669:21 (Abrahms), 2243:2-2244:23 (Pompay).

Moreover, Athens never agreed to a Union proposal across the table, and even when a Union proposal was acceptable without modification, Athens always caucused before agreeing to the proposal so that its decision makers could evaluate it. Jt. Ex. 1, Nos. 11-54; Jt. Ex. 11-54; Er. Ex. 29 at 1975; Jt. Ex. 62; Tr., 2151:22-5158:14 (Torres); 2260:17-2264:9; 2265:8-2669:21 (Abrahms), 2243:2-2244:23 (Pompay). If acceptable, Athens would then prepare a written tentative agreement, and only Cesar Torres signed the tentative agreements on behalf of Athens; Abrahms never once executed a tentative agreement. Jt. Ex. 8. In fact, the General Counsel did not present evidence of a single specific example where Abrahms made a bargaining proposal without Athens' decision makers present or where Abrahms agreed to a Union proposal without first caucusing with Athens' decision makers. This stands in stark contrast to situations where the Board has found a negotiator had authority. *See Medical Towers Ltd.*, 285 NLRB 1011, 1013 (finding apparent authority where, *inter alia*, the negotiator had represented the employer alone at a collective bargaining session; had executed collective bargaining agreements with the union at other locations headed by the same chief executive officer; and where the principle testified in the past that the negotiator had virtually limitless authority regarding collective bargaining and labor relations). Given this evidence, Abrahms' role as Chief Negotiator alone could not confer apparent authority on him when the January 11 meeting was radically different than all other bargaining sessions.

Indeed, Phillips admitted that the Union attorney who served as the Union's Chief Negotiator did not have authority to make proposals without the approval of the Union's decision makers. Tr., 1072:5-12, 1131:16-22, 1153:24-1154:12 (Phillips). Rather, the proposals its attorney Chief Negotiator made were specifically authorized by the Union's decision makers. *Id.* It makes no sense that the Union would assume Abrahms has apparent authority to make bargaining proposals by virtue of his role as Chief Negotiator, yet the Union's own Chief Negotiator did not have such authority.

c. <u>The Evidence Proves Abrahms Never Said or Did Anything That Would Convey Authority to Make Formal Bargaining Proposals.</u>

The record evidence belies the Union's outlandish claims that Abrahms conveyed he had authority to formally propose specific dollar amounts for healthcare and wages. Rather, the evidence shows Abrahms made it clear that all terms would need to be approved by Athens' decision makers, and the parties actually debated the numbers both parties mutually floated, with the Union continually pushing Abrahms higher. For example, the parties initially discussed a $900 employer healthcare contribution, and when the Union pushed for more, Abrahms explained he "might" be able to convince Athens to agree to a $950 monthly contribution, but he did not believe Athens would go any higher than that. Tr., 2315:6-2317:12, 2320:11-2321:17, 2345:24-2346:8 (Abrahms). Similarly, with wages, Abrahms, Phillips and Smith all testified, and the scratch-outs on their notes reflect, the Union did not simply accept the wage levels Abrahms initially stated, but rather altered the wage rates based on the Union's stated preferences. Tr., 886:24-887:7 (Smith), 1221:11-1222:8 (Phillips); Tr.,2323:25-2326:2, 2345:24-2346:8 (Abrahms); Er. Ex. 31; GC Ex. 16. Finally, Abrahms' notes indicate areas where the Union initially took one position, but when Abrahms indicated he thought Athens would likely reject them, the Union changed its position. ER. Ex. 31; Tr., 2335:5-2336:1 (Abrahms). For example, the Union changed its position

on overtime and holidays after Abrahms represented Athens likely would not approve the Union's position. *Id.*

To circumvent this evidence, Phillips and Smith attempted to downplay the cooperative nature of the meeting by testifying that Abrahms presented "bottom line" numbers he indicated his client was prepared to offer, and the Union just accepted these numbers without resistance. However, they could not support their conclusory statements with any modicum of detail, and Abrahms' specific, detailed recollections of the parties' January 11 meeting is far more credible.

i. <u>Abrahms Specific and Detailed Testimony About the January 11 Meeting is More Credible Than Phillips' and Smith's Testimony.</u>

Compared to the vague and non-specific testimony of Phillips and Smith, Abrahms' specific, detailed, and logical explanations about the parties' process, their communications and the record exhibits are much more credible. Under guiding credibility principles, a lack of specific recollection, general denials and comparative vagueness is generally insufficient to rebut more detailed testimony. *Atelier Condo*, supra 361 NLRB at 989-990; *Precoat Metals*, 341 NLRB 1137, 1150 (2004); *Mercedes Benz of Orlando Park*, 333 NLRB 1017, 1035 (2001) ("It is settled that general or 'blanket' denials are insufficient to refute specific and detailed testimony advanced by the opposing side's witness."). "[T]he board has found that when a witness fails to deny or only generally denies without further specificity certain testimony from an opposing witness, an adverse inference is warranted." *Atelier Condo*, 361 NLRB at 989-990 citing *LSF Transportation, Inc.*, 330 NLRB 1054, 1063, fn. 11. Applied here, these credibility principles not only compel accepting Abrahms testimony over Phillips' and Smith's testimony, but also warrant an adverse inference about the overall veracity of Phillips and Smith.

For example, Phillips and Smith could not recall specific discussions at the January 11 meeting or even generally explain the process by which the parties decided upon settlement

contract terms. *See, e.g.*, Tr., 880:9-881:25; 886:4-887:22 (Smith); 1218:1-1226:22, 1228:4-1229:6 (Phillips). Moreover, as Smith's own notes reflect, and Smith and Phillips conceded, the parties changed their positions during the course of the January 11 meeting, yet neither Phillips nor Smith could credibly reconcile those changes with their testimony that Abrahms presented non-negotiable, pre-authorized numbers. Tr., 1228:4-1229:6 (Phillips). Abrahms, however, credibly explained what actually occurred. As Abrahms testified, when the parties discussed potential contract terms, Abrahms responded with phrases like, "let me see if I can go get them to do that" or "they might go that high…let me go check." Tr., 2345:20-2346:8 (Abrahms); *see also* Tr., 2323:25-2326:2, 2315:6-2317:12, 2320:11-2321:17 (Abrahms). Occasionally, Abrahms responded he did not believe Athens' decision makers would agree to the Union's position, and the Union changed its position as a result. Tr., 2316:2-17, 2335:5-2336:1 (Abrahms); Er. Ex. 31; *see also* GC Ex. 16. Indeed, Abrahms even recalled a specific incident where the Union pushed for a higher hourly wage rate for a classification in which a Union's bargaining committee member worked, and Abrahms said, "okay, we will see what we can do." Tr., 2324:5-2325:4 (Abrahms).

Likewise, Phillips and Smith could not credibly explain why Athens suddenly moved off its position on union security even though this was the single issue that caused negotiations to break down in 2018, and the factors that caused Athens to take such a resolute position on union security in bargaining – the pending decertification petitions – had not been resolved. Tr., 1054:25-1055:23, 1207:23-1209:1 (Phillips), 879:14-880:3, 993:16-994:13 (Smith). Instead, they merely testified they could not recall any conversation regarding union security. *Id.* Abrahms, however, provided a detailed credible explanation why Athens was willing to consider union security; namely the entire discussion was premised on the Union's withdrawal of the Blocking Charges and ratification decertification vote as part of the global settlement concept.

Similarly, for retirement, Phillips and Smith could not recall any discussions on retirement benefits at the January 11 meeting, but Abrahms did. Tr., 1055:24-1056:7 (Phillips); 882:20-883:8 (Smith). More specifically, Abrahms explained the parties' differing positions on retirement benefits – whether Athens would make a per hour contribution or a discretionary match to employees' 401k accounts – and the compromise the parties decided to present to Athens' decision makers. Tr., 2326:3-2328:2 (Abrahms).

Finally, Phillips and Smith could not explain with any reasonable level of detail what logistical concerns they discussed with Abrahms after the discussed potential contract terms, but Abrahms explained what the parties discussed in detail. Tr., 890:10-891:4 (Smith), 1056:12-1058:4 (Smith); 2328:13-2331:5 (Abrahms). Abrahms testified the parties discussed how both the Region and decertification petitioners would need to approve the global settlement concept before it could be implemented. Tr., 2328:13-2331:5 (Abrahms). Abrahms also testified that he talked about voting logistics with Phillips and Smith, including having an arbitrator facilitate the vote, conducting the vote at a neutral location, and having the three separate bargaining units vote at approximately the same time to avoid undue influence. *Id.* Indeed, although both Phillips and Smith admitted it was, at the very least, unusual for an employer to dictate how the Union would conduct its ratification vote, neither one could explain why the Union was willing to agree to such procedures if these discussions were ordinary contract negotiations. Tr., 1005:24-1006:7 (Smith), 1252:25-1253:17 (Phillips).

ii. <u>The General Counsel Did Not Rebut Abrahms' Testimony.</u>

The General Counsel's failure to rebut Abrahms' testimony precipitates an adverse inference against the General Counsel and the Union and in favor of crediting Abrahms testimony, including that Abrahms conveyed his limited authority to the Union. *Government Employees (IBPO)*, supra; *Vigo Industrial LLC*, 363 NLRB No. 70, slip op at 5. As noted above, Abrahms

testified about specific and detailed discussions he had with Herrera, Phillips and Smith at the January 11 meeting. For example, in addition to expressly disclaiming any authority to make or agree to a proposal to Herrera, he testified that he used equivocal words and phrases to communicate his limited authority, he testified about the parties' process and how they arrived at certain potential terms, and he testified about the logistical aspects the parties discussed. Tr., 2310:12-2312:14, 2320:19-2321:18, 2345:20-2347:24 (Abrahms). During the General Counsel's case-in-chief, Herrera, Phillips and Smith did not deny such conversations took place, and the General Counsel failed to call them on rebuttal to elicit such denials. This leads to the reasonable conclusion that had Herrera, Phillips and Smith testified on rebuttal, they would not have contradicted Abrahms testimony. *Government Employees (IBPO),* supra at 699; *Vigo Industrial, LLC*, supra, slip op at 5.

iii. Phillips' Conclusory and Non-Specific Testimony That Abrahms Conveyed He Had Authority to Make Bargaining Proposals Is Not Credible.

Phillips evasive, conclusory and non-specific testimony about how Abrahms conveyed his proposal-making authority is not credible. *Atelier Condo*, supra 361 NLRB at 989-990 citing *LSF Transportation, Inc.*, 330 NLRB 1054, 1063, fn. 11. At Hearing, Phillips testified it was "apparent and obvious" the January 11 meeting was a collective bargaining session, and Abrahms presented "bottom line" numbers that Athens had authorized him to offer, which the Union accepted without negotiation. Tr., 1049:18-24; Tr., 1060:5-10; 1069:10-19 (Phillips). However, when pressed on cross examination to provide basic details about the parties' process and what Abrahms said or did to communicate his authority, Phillips was unable to do so. *See*, *e.g.*, Tr., 1208:6-1211:18, 1214:16-1216:17, 1218:1-1229:16, 1229:17-11 (Phillips). Instead, he was evasive, he changed his story and he repeatedly asserted non-responsive, conclusory statements about Abrahms' authority.

Id. Here, Phillips' general denials and transparent inability to provide any specificity not only destroys his credibility but warrants an adverse inference in Athens' favor.

For example, Phillips testified that he knew Abrahms had proposal-making authority because Abrahms presented specific, bottom line hourly wage rates for each classification and communicated, "This is the most my client's willing to go." Tr., 1069:2-19 (Phillips). However, when pressed, on cross examination, to reconcile this testimony with the undisputed evidence that the Union, in fact, modified those numbers based on its stated preferences, Phillips could not do so, and he subsequently changed his testimony to assert the Union worked within the "economic parameters" (a term he could not explain) Abrahms presented. Tr., 1218:1-1226:22, 1228:4-1229:6 (Phillips).

A specific, bottom line number is obviously very different than an "economic parameter," particularly when it comes to hourly wage rates for different classifications. Moving even a nickel from one classification to another can have widely varying financial impacts on an employer depending on how many hours those employees work and how many employees are in that classification, and it requires the balancing of many factors – and institutional expertise that Abrahms, who is a labor attorney and not Athens' operational executive, lacked. Nonetheless, Phillips unbelievably claims Abrahms made this complex calculation on his own without any Athens' decision makers present, yet he was unable to provide even the most basic details about how that process worked or what the parties discussed.

Similarly, Phillips initially unequivocally testified about wages, "We didn't bargain back and forth, we just took what you offered." Tr., 1222:23-25 (Phillips). Again, though, when questioned on the Union's wage modifications, Phillips eventually admitted there was back and forth discussion between the parties. Tr., 1228:4-1229:6 (Phillips).

Indeed, Phillips even admitted that Abrahms stated he needed to "bring back the agreement to his client." Tr., 1060:21:1061:3 (Phillips). Although Phillips also testified that he understood Abrahms only needed to inform his client the parties reached a deal, he did not state what words Abrahms used to create this understanding, and he provided no objectively reasonable and credible basis for his self-serving presumption. *Id.*

At Hearing, Phillips also made the patently false statement that the January 11 meeting was "just like any other negotiation." Tr., 1060:5-10 (Phillips). This is a ridiculous claim as even the General Counsel conceded the January 11 meeting was unlike any other bargaining session. However, Phillips refused to concede this truth while under oath. Tr., 1204:25 ("Q Okay. It was not like every other session, though -- or any other session previously; is that fair to say? A No, that's not fair to say."). Phillips denials in the face of such overwhelming undisputed evidence are dishonest, to say the least.

Lastly, Phillips' demeanor at the Hearing reflects his lack of credibility. Phillips repeatedly answered very specific questions with non-responsive conclusory statements about Abrahms' authority, and at times, the ALJ had to step in *sua sponte* to ensure Phillips directly answered the cross examination questions. *See, e.g.*, Tr., 1221:11-1221:22, 1226:6-22 (Phillips). Moreover, when unable to answer the most basic questions about the parties' process at the January 11 meeting, Phillips conveyed his exasperation with phrases like, "Adam, I just took you at face value" and "I don't know what to do." Tr., 1226:6-1227:8 (Phillips).

Phillips shifting testimony, inconsistent explanations, and unsupported assertions not only impeach his credibility, but warrant an adverse inference that Abrahms did not indicate he had authority to make formal bargaining proposals. Indeed, the only thing consistent about Phillips' testimony was its transparent lack of credibility and his willingness to make unsupported and

contradicted statements in support of his clear bias. When compared to Abrahms' credible and unequivocal testimony as well as Abrahms' experience as an attorney and outside negotiator, it would be unbelievable and illogical that Abrahms would make any statement like those the Union recklessly claimed.

iv. Smith Testified That The Parties Never Discussed Abrahms' Authority to Make Bargaining Proposals.

Like Phillips, Smith was unable to substantiate his general conclusory assertions with specific detail about the parties' process at the January 11 meeting. *Atelier Condo*, 361 NLRB at 989-990 citing *LSF Transportation, Inc.*, 330 NLRB 1054, 1063, fn. 11. Smith testified that the parties had minimal back and forth and, for the most part, the Union just accepted the number Abrahms presented. Tr., 887:8-22 (Smith). However, Smith could not explain the reasons for the changes to certain items, as reflected in his notes, other than the conclusory assertion that the parties simply changed their mind. GC Ex. 16; Tr., 886:19-887:20 (Smith); *see also* Er. Ex. 31. This generalized denial cannot overcome Abrahms' specific explanations about what occurred – the Union changed its position after Abrahms indicated he did not believe Athens' decision makers would approve the Union's position.

Indeed, the very fact changes were made undermines his testimony that Abrahms presented non-negotiable numbers. Even assuming *arguendo* Abrahms presented non-negotiable numbers, Abrahms certainly would not have apparent authority to deviate from those non-negotiable numbers as he sees fit, particularly with respect to items with wide ranging financial implications like hourly wage rates. Rather, the much more reasonable inference, and as Abrahms testified, the parties openly discussed wage rates and when the Union pushed on certain numbers, Abrahms agreed to take those numbers back to Athens' decision makers to see if they would work.

Smith also unequivocally testified there were no discussions about Abrahms' authority to make bargaining proposals on January 11, 2019. Tr., 891:12-14 (Smith). Given that the January 11 meeting was entirely unlike any prior bargaining session, and the parties debated potential terms at the meeting, it would be unreasonable to conclude that Abrahms had the authority to unilaterally make binding proposals about important financial matters. Consequently, the overwhelming record evidence established that Abrahms did not have the authority to make any proposals and in fact did not make any proposals.

4. <u>The Evidence Shows Athens Did Not Engage in Regressive Bargaining.</u>

Even if the discussions in question were not settlement discussions, which they clearly were, Athens did not engage in regressive bargaining because it never withdrew a proposal, and even if it did such withdrawal was not in bad faith as it had good cause to do so. Regressive bargaining occurs where the employer makes a less favorable proposal that is "so harsh, vindictive, or otherwise unreasonable as to warrant a conclusion they were proffered in bad faith." *Management & Training Corporation*, 366 NLRB No. 134, at 4 (2018); *Comau, Inc.*, 356 NLRB 75, 85 (2010); *Driftwood Convalescent Hospital*, 312 NLRB 247, 252 (1993). Importantly, the mere fact that a proposal is "regressive" does not violate the Act. *Id.* Rather, a regressive proposal must have been made in bad faith with the purpose of frustrating an agreement to violate the Act. *Id.*

The Board examines the totality of the circumstances and the employer's conduct in bargaining when assessing whether a regressive proposal violates the Act:

> To determine whether regressive proposals are unlawful, the Board considers the totality of an employer's conduct and the circumstances, including such factors as the substance and timing of bargaining proposals, the parties' bargaining history, whether and how the employer explains its proposals, and other evidence of its intent. [citations] The fact that proposals are regressive or unacceptable to the union, or that the union find the employer's

> explanations for them unpersuasive, does not suffice to make the proposals unlawful if they are not so harsh, vindictive or otherwise unreasonable as to warrant a conclusion they were proffered in bad faith.

Management & Training Corporation, supra at 4; *see also Graphic Communications International Union Local 485-3M v. NLRB*, 206 F.3d 22, 33 (D.C. Cir. 2000) (Board assessed whether the employer's purported reasons "were so illogical or unreasonable as to necessarily warrant an inference of bad faith.").

Importantly, "the withdrawal of previous proposals does not per se establish the absence of good faith, but rather represents one factor in the totality of circumstances test." *White Cap, Inc.*, 325 N.L.R.B. 1166, 1169, (1998). Rather, "the Board examines the totality of the employer's conduct, both away from and at the bargaining table" to ascertain whether the employer desired to frustrate an agreement. *Quality House of Graphics, Inc.*, *supra* at 515. The General Counsel did not meet this high burden.

a. <u>Athens Never Withdrew a Proposal.</u>

Athens never withdrew its last bargaining proposal and, thus, cannot have engaged in regressive bargaining. Jt. Ex. 50. It is axiomatic that before regressive bargaining can occur, the employer must actually withdraw a formal bargaining proposal. *Management & Training Corporation*, 366 NLRB No. 134, at 4 (2018).

As noted above, Athens made its last proposal on (no) union security, healthcare and wages on October 31, 2018, and it never withdrew this proposal. Jt. Ex. 50. Prior to impasse, Athens proposed Union healthcare with an Athens' contribution of $700 per month per employee contingent upon the Union's unqualified acceptance of Athens' retirement benefits proposal – a 401k plan with a discretionary annual bonus and a 2 ½ percent employer match. Jt. Ex. 50. On November 27, 2018, the parties discussed potential paths forward, but Athens held to its October

31 proposal. Jt. Ex. 52-54; Er. Ex. 30 at 1982; Tr., 2168:4-2170:18 (Torres); 2292:16-2294:9 (Abrahms); 2455:24-2457:11 (Pompay). The Union rejected this proposal or any discussion about a path forward and declared impasse. *Id.*; Jt. Ex. 51. However, Athens never withdrew its last proposal. Jt. Ex. 50. In fact, Athens has invited the Union to return to the bargaining table and resume negotiations from the parties' last respective bargaining proposals, but the Union has yet to accept this invitation. Er. Ex. 11.

Moreover, as noted, all discussions about substantive contract terms that occurred at the January 11 meeting were understood by both parties to be hypothetical, non-binding conceptualizations, not formal bargaining proposals. Er. Ex. 13; Tr., 1351:20-1352:3 (Herrera); 2311:13-2312:14, 2323:25-2326:2, 2315:6-2317:12, 2320:11-2321:17, 2345:20-2346:8 (Abrahms). . Indeed, Abrahms repeatedly reminded the Union that he did not have any authority to make a formal bargaining proposal after impasse, and any concepts hypothesized at the January 11 meeting would ultimately need to be reviewed and approved by Athens' decision makers. *Id.* However, as discussed below, even if they were formal bargaining proposals, Athens never withdrew a proposal; it merely rejected the newly proposed material terms of the Union's counterproposal.

b. <u>Athens Never Made a Proposal for the New Healthcare Plan Presented To The Company After the January 11 Meeting.</u>

Additionally, the evidence proves that Athens never made a proposal for the new Union healthcare plan first presented to Athens *after* the January 11 meeting, and thus, it could not have withdrawn a proposal for that new Union healthcare plan. It is undisputed that when Abrahms allegedly proposed the monthly employer healthcare contribution, the only Union healthcare plan Athens had any knowledge of was the TSIT Competitor Plan which was presented by the Union across the table at bargaining, and offered $15 co-pays, full hospitalization coverage and was the

same plan Athens' competitors offered. Er. Ex. 7; Tr., 2158:15-2160:18 (Torres), 2271:8-2275:12 (Abrahms), 2446:7-2447:20 (Pompay), 881:3-8, 994:24-995:7 (Smith). Thus, when Abrahms discussed the healthcare contribution at the January 11 meeting, he was necessarily discussing a potential contribution to the TSIT Competitor Plan; obviously, Athens cannot make a proposal for a healthcare plan it does not even know exists. *Id.* Thus, Athens never made any proposal to join the new Union healthcare plan presented to Athens, for the first time, *after* the January 11 meeting.

Apparently, the General Counsel's theory is that Athens (through Abrahms alone) gave the Union carte blanche to design a plan that would accommodate a $950 monthly employer contribution. This position is unreasonable, at best. It makes no sense why Athens would suddenly decide the plan features were unimportant when, for the past year of collective bargaining negotiations, the parties had discussed in detail what features the Union's plan offered compared to Athens' current healthcare plan, and the Union repeatedly advocated across the table that those plan features were the reason why Athens should abandon its current healthcare plan.

Moreover, under the General Counsel's untenable theory, the Union could have proposed a healthcare plan that cost far less than $950 per month, and Athens would have been powerless to decline it no matter how much it was being overcharged. Indeed, that is exactly what happened here. The Union presented a plan that only cost $850 per month, yet it sought to charge Athens approximately $100 more per month than the plan's actual cost. Tr., 2354:25-2358: 2 (Abrahms); 2466:10-2470:22 (Pompay); Er. Ex. 38.

To support its position, the General Counsel will likely argue Athens knew the Union intended to design a new plan to accommodate the alleged healthcare proposal. However, the Union, through Smith, agreed with Abrahms that the parties never discussed a new plan design at the January 11 meeting. Tr., 881:3-8, 994:24-995:7 (Smith); 2317:5-12 (Abrahms). Although

Phillips testified contrarily, his testimony is directly belied by both his general lack of credibility noted above and the General Counsel's own witness (Smith), in addition to Abrahms' clear testimony, and therefore should not be credited.

Moreover, Athens lack of knowledge is confirmed by Abrahms questioning Smith's request for authorization to permit the Union to access Athens employees' healthcare rating. Er. Ex. 32; Tr., 2349:20-2352:17 (Abrahms). When Abrahms asked Smith about the purpose of this information, Smith never stated the Union needed it to develop a new plan; he merely stated the Union needed the information to evaluate the $950 monthly employer contribution.[21] *Id.*

The General Counsel may also argue, as it implied at the Hearing, that Athens could not have reasonably believed it would obtain the TSIT Competitor Plan for $950 per month when the plan actually cost much more than that. However, as Torres, Pompay and Abrahms all testified, and as the parties' actual bargaining proposals and history confirm, Athens always understood employees would cover the remaining premium balance. Tr., 2203:18-2204:7 (Torres); 2284:12-18 (Abrahms); 2455:6-14 (Pompay); *see also, e.g.,* Jt. Ex. 44 at p. 7, Jt. Ex. 50 at p. 7. Thus, the mere fact that Athens allegedly proposed a monthly contribution that did not equal the plan's cost does not prove Athens understood the Union intended to design an entirely new plan to accommodate Athens' alleged proposal.[22]

[21] The General Counsel may argue that the letter of authorization Athens provided pursuant to Smith's request proves the parties were in collective bargaining negotiations because the letter states the parties were. However, as Smith testified at the hearing, Kaiser drafted this letter, not Athens. Tr., 2464:16-2465:7 (Pompay)

[22] In fact, Abrahms testified he thought Smith requested the Athens' plan rating information to see if its employees' healthier status may have lowered costs of the TSIT Competitor Plan, enabling the Union to offer (together with employee contributions acceptable to the union) the same TSIT Competitor Plan at the lower potential contribution rate the parties discussed at the January 11 meeting.

c. There is No Evidence that Athens Proffered a Regressive Proposal for the Purpose of Frustrating an Agreement.

Even assuming Athens made formal bargaining proposals at the January 11 meeting, which were subsequently withdrawn, the totality of the circumstances show Athens would have done so based on legitimate financial concerns, not to frustrate an agreement. As noted above, when assessing the intent behind an employer's regressive proposal, the Board examines the totality of the circumstances:

> To determine whether regressive proposals are unlawful, the Board considers the totality of an employer's conduct and the circumstances, including such factors as the substance and timing of bargaining proposals, the parties' bargaining history, whether and how the employer explains its proposals, and other evidence of its intent. [citations]

Management & Training Corporation, supra at 4.

Importantly, "the withdrawal of previous proposals does not per se establish the absence of good faith, but rather represents one factor in the totality of circumstances test." *White Cap, Inc.*, 325 N.L.R.B. 1166, 1169, (1998). Thus, if the totality of the circumstances, including "the employer's conduct, both away from and at the bargaining table" does not show an intent to frustrate an agreement, no bad faith bargaining occurred notwithstanding the regressive proposal. *Quality House of Graphics, Inc.*, 336 NLRB 497, 515 (2001).

Notably, if the employer proffers a legitimate justification for its regressive proposal, it is incumbent upon the General Counsel to prove the asserted explanation is the pretextual, illogical, or unreasonable:

> It is immaterial whether the Union, the General Counsel, or [the Administrative Law Judge] find these reasons totally persuasive. What is important is whether they are "so illogical" as to warrant the conclusion that the Respondent by offering them demonstrated an intent to frustrate the bargaining process and thereby preclude the reaching of any agreement

Barry-Wehmiller Co., 271 N.L.R.B. 471, 473 (1984); *see also Quality House of Graphics* (finding the employer's purported justifications for its regressive proposal pretextual *supra* at 515; *Graphic Communications International Union Local 485-3M v. NLRB*, 206 F.3d 22, 33 (D.C. Cir. 2000) (Board assesses whether the employer's purported reasons "were so illogical or unreasonable as to necessarily warrant an inference of bad faith.").

i. Athens' Position Was Based on Legitimate, Demonstrative Financial Factors.

Athens' alleged withdrawal of its healthcare and wage proposals was based on legitimate and demonstrative financial considerations and, thus, cannot constitute bad faith bargaining. *See Barry-Wehmiller Co.*, supra at 473 (changed economic circumstances justified employer's regressive proposal and these stated justifications were not so illogical as to warrant a finding of bad faith); *see also World Publishing Co.*, 220 NLRB 1065 (1972) (finding no bad faith bargaining when the regressive proposal was based upon changed economic circumstances).

First, the materially different plan terms offered by the Union during the confidential settlement discussions constituted a change in economic circumstances which gave Athens justification to withdraw any proposal made regarding Union healthcare. As noted above, the Union would not accommodate the $950 contribution cap for the TSIT Competitor Plan so it developed an entirely new plan which it presented to Athens long after the January 11 meeting. GC Ex. 21 at p. 2; Er. Ex. 7; Tr., 2354:7-24 (Abrahms), 2466:10-2467:16 (Pompay). When Athens analyzed the new plan, it discovered two important and previously unknown facts: (1) the Union was actually overcharging Athens by approximately $100 per month as Athens could obtain the same healthcare insurance for approximately $850 month and (2) removing 400 union employees from the Company's group healthcare plan would destabilize the Company's existing plan and drive up costs for the remaining 1,200 non-Union employees. Tr., 2354:25-2358:2 (Abrahms),

2466:10-2470:22 (Pompay); Er. Ex. 38. Coupled with the increased healthcare costs of approximately $250 per month for each of the approximately 400 represented employees ($1.2 million per year), for essentially the same healthcare it was currently providing to employees, Athens decided it could not agree to the new Union healthcare plan. *Id.*; Tr., 2425:2-2426:12 (Abrahms); Er. Ex. 11. Moreover, in rejecting the new Union's healthcare proposal, Abrahms dutifully explained the reasons why to the Union – *i.e.*, that it could obtain the same healthcare insurance at a cheaper rate and the financial impact was too great. *Id.*

The financial ramifications of the Union's new healthcare plan –including the new plan provisions, the additional increased healthcare costs, the fact that Athens could obtain the same plan at a much cheaper rate, and the destabilizing impact agreeing to Union healthcare would have on the healthcare plan offered to Athens' non-Union employees[23] –are undisputed, and are certainly not so illogical as to warrant an inference of bad faith.

Similarly, with wages, Athens' decision makers analyzed the financial impact of the wage rates discussed at the January 11 meeting and decided it increased its costs too much. Er. Ex. 11; Tr., 2426:21-2427:14 (Abrahms). Once again, it is certainly not illogical for an employer to determine that the aggressive wage increases cost too much.

The General Counsel may argue these reasons are pretextual because Athens should have known the financial impact its healthcare and wage proposal would have prior to making the proposal. However, as noted above, they did not do this because whatever Abrahms discussed with the Union at the January 11 meeting was subject to review and approval by Athens' decision

[23] The General Counsel will undoubtedly argue, as it did at the Hearing, that with the increased costs and the destabilizing impact, Athens should have known about the destabilizing impact that removing 400 employees would have on its current healthcare plan when it made the alleged proposal. However, the undisputed evidence shows that Athens did not learn about this impact until after the Union presented the new healthcare plan. Tr., 2470:5-22 (Pompay)

makers. Notably, while the General Counsel contends Abrahms had apparent authority to make a proposal, as demonstrated above, in actuality, Abrahms did not have authority and all potential terms were subject to Athens' review and approval. Moreover, even if this were not the case, there is no law that precludes an employer from withdrawing a proposal because it later discovered the financial impact of that proposal would be too great. The Act only precludes an employer from proffering a regressive proposal to frustrate an agreement. There is no evidence of that here.

ii. The Union's Decision to Not Withdraw Its Blocking Charges Gave Athens Justification for Maintaining Its Rejection of Its Union Security.

As detailed above, it is undisputed that Athens entered into the discussions at the January 11 meeting in order to settle the Union's Blocking Charges, and this potential settlement was the sole reason Athens was willing to entertain the union security. Tr., 2118:13-2119:13, 2172:21-2174:15, 2175:2-7, 2177:23-25 (Torres), 2347:2-24 (Abrahms), 2457:16-2459:18 (Pompay); Jt. Ex. 1, No. 1. However, when the Union rejected the settlement package and made clear it would not withdraw the Blocking Charges, Athens' sole motivation to consider those contract terms evaporated, and this change in circumstances gave the Company good cause to withdraw any alleged settlement proposal and maintain its previous October 31, 2018 proposal, including its rejection of union security.

iii. Athens Conduct in Bargaining Shows It Harbored No Intent to Preclude an Agreement.

Not only was Athens' alleged reversion based on legitimate, demonstrable financial factors and materially changed circumstances, but also the Company's conduct in bargaining for more than a year belies any suggestion that it intended to frustrate an agreement. The record reflects no refusal to meet and confer with the Union, to provide information during bargaining, or to justify its bargaining posture. To the contrary, Athens conducted 18 in-person bargaining sessions with

the Union over the course of a year, and the parties reached tentative agreements on numerous articles. Jt. Ex. 1, Nos. 8-54; Jt. Ex. 62. Moreover, with respect to the key issue that caused negotiations to break down, *i.e.*, union security, the Company proposed two alternatives as a path forward on this thorny issue before the parties reached impasse in an effort to avoid that very result. Jt. Ex. 52-54; Er. Ex. 30 at 1982; Tr., 2168:4-2170:18 (Torres); 2292:16-2294:9 (Abrahms); 2455:24-2457:11 (Pompay). However, the Union rejected both proposed paths forward and did not proffer an alternative that would assuage the Company's concerns. *Id.* Thus, far from indicating a design to frustrate an agreement, the undisputed evidence shows Athens negotiated in good faith to reach an agreement and actually offered alternative solutions to help the parties avoid reaching impasse.

Finally, when Athens presented the written settlement package to the Union on March 17, 2019, it suggested the parties return to the bargaining table and resume negotiations based on their last proposals if they could not finalize a global settlement. Er. Ex. 11; Tr., 2379:12-16 (Abrahms). Thus, Athens actually sought to return to the bargaining table. *Id.* Moreover, it has been the Union, not Athens, which has refused to schedule additional bargaining dates.

The General Counsel suggested at the Hearing that Athens withdrew its bargaining proposal because it knew the employees would vote to ratify the contract after the Union developed a healthcare plan that would not increase employees' healthcare costs. This theory is based on nothing more than rank speculation. In fact, given the pending decertification petitions and the Union's refusal to confirm its claims of majority status, it can be reasonably inferred, if not presumed, that employees did not want to be governed by a Union contract in their employment. Moreover, as noted above, the undisputed evidence proves that Athens ultimately bargained for more than a year to reach an agreement with the Union, and when Athens rejected the Union's

new healthcare plan and the potential wages discussed at the January 11 meeting, it had legitimate reasons to do so, and it explained its position to the Union. These circumstances do not indicate bad faith.

Finally, the decertification-ratification was Abrahms' idea. If Athens wanted to avoid ratification, it could have just let the Union's impasse from November 27, 2018 stand. The General Counsel's unsupported theory is simply illogical, much less sufficient to establish bad faith bargaining.

5. <u>There is No Remedy for the Alleged Regressive Bargaining.</u>

Although clearly there was no violation of Section 8(a)(5), the General Counsel's requested remedy for regressive bargaining – reinstatement of Athens' alleged January 11 proposal – is impossible because it was based upon contingencies that either no longer exist or have not occurred. As detailed above, the alleged proposals made on January 11 were contingent upon, *inter alia*, the pre-hearing withdrawal of the Blocking Charges and the withdrawal of the decertification petitions. Er. Ex. 31; Tr., 1056:10-1058:4 (Phillips), 1339:6-9, 1351:5-7 (Herrera), 2305:15-21, 2303:11-2304:4, 2304:7-16, 2328:13-2331:5 (Abrahms). This was both to alleviate pressure from the City related to the Blocking Charges as well as, obviously, to avoid the costs and distractions of an unfair labor practice charge hearing. Tr., 2118:13-2119:13, 2172:21-2174:15, 2175:2-7, 2177:23-25 (Torres), 2299:18-2301:10, 2374:2-11 (Abrahms); Jt. Ex. 1, No. 1. Now that the parties have litigated the Blocking Charges, the Union can no longer withdraw them so that contingency no longer exists and the benefit of the bargain has been irreparably eliminated. Likewise, although the decertification petitions are still pending, there is no guarantee the petitioners will withdraw them, and the ALJ certainly cannot order the petitioners to withdrawal their petitions in exchange for the decertification-ratification vote conceived by the Union and Athens.

Similar issues exist with respect to the employer healthcare contribution. When Abrahms allegedly offered $950 per month, it was for the TSIT Competitor Plan, not the new Union healthcare plan presented on February 25, 2019. Er. Ex. 7; Tr., 2158:15-2160:18 (Torres), 2271:8-2275:12 (Abrahms), 2446:7-2447:20 (Pompay), 881:3-8, 994:24-995:7 (Smith). As noted above, Athens certainly cannot be directed to accept a healthcare plan about which it had no knowledge when it made the alleged proposal. Moreover, as evidenced by the Union's creation of a new healthcare plan, the Union already determined that it could not make the $950 employer contribution work for the TSIT Competitor Plan, and it rejected that proposal. GC Ex. 21. Thus, ordering Athens to reinstate its rejected alleged proposal for the TSIT Competitor Plan would both not be sanctioned by the Act and would be futile.

For all of the foregoing reasons, the General Counsel has failed to prove bad faith regressive bargaining or any violation of Section 8(a)(5). Therefore, this allegation and Paragraphs 16 and 19 of the Complaint should be dismissed.

III. ATHENS' PEORIA YARD DID NOT VIOLATE THE ACT BY DISCIPLINING DAMIAN WEICKS.

In order to block the decertification petition at Athens' Peoria Yard, the Union made the contrived allegation that Damian Weicks was disciplined for his Union activities. The Union and General Counsel now allege this single violation of the Act at the Peoria Yard. This allegation was shown to be meritless and completely devoid of factual support.

A. Damian Weicks Was Lawfully Issued a Written Warning for his Demeaning and Inappropriate Comments.

1. Relevant Facts.

The Peoria Yard is a small yard that in 2018 had approximately eight shop employees, a mix of welders, bin painters, and bin washers. Tr., 1505:5-11 (Rubio). The Peoria Yard is in charge of refurbishing bins. Tr., 1504:20 (Rubio). The bins are brought in by drivers and then

they are carried by forklift to the welders. Tr., 1504:21-23 (Rubio). The welders decide if a bin should be refurbished or if it should be scrapped. Tr., 1504:23-24 (Rubio). If a bin is to be refurbished, it is delivered to the bin washers who wash and clean the bin. 1504:25-1505:2 (Rubio). The bin is then taken to a bin painter who paints the bin with a sprayer and then places the bin in the ready line. 1505:1-3 (Rubio). The bin is then ready to be delivered to a customer. 1505:4 (Rubio). Since the Peoria Yard is a small yard and runs like a production line, it is crucial that employees communicate with one another and be respectful to one another. Tr., 1505:12-18, 1506:7-15 (Rubio).

When Julio Porres first started as a bin painter at the Peoria Yard he was trained by Weicks. Tr., 1476:1-12 (Porres). Weicks instructed Porres that if a bin was still dirty after it had been washed, that he should return the bin to the bin washers and communicate to the bin washers that the bin was still dirty. Tr., 1476:13-23 (Porres). He was trained to communicate to the bin washers that a bin is still dirty so that the problem can be fixed and the same bin is not returned to the bin painting area dirty again. Tr., 1477:3-19 (Porres). This communication is important and necessary because at times there is grease on the bins, which makes the bins appear as though they are clean but the grease prevents the paint from sticking to the bin, thus without communication the washers may not know what the issue is. Tr., 1535:22-1536:2 (Rubio).

On April 17, 2018, Luis Rubio, the Operations Lead at Peoria, was approached by Weicks who told him that he had returned a bin to the bin washers twice already. Tr., 1510:15-22 (Rubio). Rubio asked Weicks if he had told the bin washers why he had returned the bin but Weicks responded that it was common sense and it was not his job to tell the bin washers what to do. Tr., 1511:5-12 (Rubio). At no point during this conversation did Weicks state that bin washer Miguel Lozano had done anything to upset him, called him a name, or cursed at him. Tr., 1511:25-1512:10

(Rubio). After this conversation, Rubio went to speak with bin washers Lozano and Nelson Zelaya. Tr., 1511:21-22 (Rubio). They told Rubio that Weicks had not spoken to them when he returned the bin and they asked Rubio why Weicks was not communicating with them. Tr., 1512:14-17, 1522:22-1523:7 (Rubio).

Rubio then called Weicks over so all four of them could meet together and talk about the situation. Tr., 1512:18-23 (Rubio). Rubio asked Weicks to please communicate with the washers when these issues occurred; however, Weicks responded that he does not talk to them because they are beneath him and he only talks to management. Tr., 1513:1-9 (Rubio); 405:21-23 (Weicks); 469:12-15 (Weicks).

Rubio was shocked by this statement as these are fighting words that could have escalated the situation into violence. Tr., 1514:3-14 (Rubio). Lozano and Zelaya were both visibly offended by this statement. Tr., 1514:15-24 (Rubio). Rubio told Weicks that it would be better to communicate with the bin washers but Weicks once again responded that he did not speak to them and that it was not his job to tell them what to do. Tr., 1515:3-10 (Rubio). Weicks then walked back to his paint booth. Tr., 1515:10 (Rubio). At no point during this conversation did Weicks state that anyone had called him a name or cursed at him. Tr., 1516:8-14 (Rubio).

After Weicks walked away, Rubio told Lozano and Zelaya to go back to the bin washing area and to not interact with Weicks at the moment as he did not want things to escalate. Tr., 1515:11-20 (Rubio).

Rubio reported this incident to his supervisor and also wrote a statement about the incident. Tr., 1516:15-19, 1517:7-13 (Rubio); Er. Ex. 14. Later that day, as part of Athens' investigation into the incident, Lupita "Lupe" Ramirez Guerrero ("Ramirez") of Human Resources called Rubio to speak to him about the incident. Tr., 1517:19-23 (Rubio). The following day, Ramirez came

to Peoria and, together with General Manager Enriquez Gonzalez, met separately with Rubio, Weicks, Lozano, and Zelaya to discuss the incident. The employees confirmed what happened the previous day: there was an issue with a dirty bin and Weicks had told Rubio, in front of Lozano and Zelaya, that he did not talk to the bin washers because they were beneath him. Tr., 1603:5-12, 1606:15-25, 1608:9-1609:11, 1609:21-1610:12 (Ramirez).

During Ramirez's meeting with Weicks, Weicks did not make any statement that Lozano or Zelaya called him a name or cursed at him during the incident. Tr., 1617:25-1618:18, 1621:14-1622:3 (Ramirez). If Weicks had made such a claim then Ramirez would have investigated any allegations of profanity against Lozano or Zelaya. Tr., 1619:19-24, 1622:4-6 (Ramirez). Nonetheless, Weicks would have still received a written warning for making the comment that the bin washers were beneath him. Tr., 1622:4-6 (Ramirez).

The following day, Weicks was given a written warning for creating a hostile work environment in violation of Athens' Anti-Harassment Policy. GC Ex. 4. The written warning contains a section in which the employee can write a comment about the discipline. GC Ex. 4. Employees are always given the opportunity to write comments in that section if they so choose. Tr., 1624:5-7, 1624:12-16 (Ramirez). Nonetheless, even here, Weicks did not write any statement regarding Lozano or Zelaya calling him a name or cursing at him during the incident. GC Ex. 4. Moreover, after receiving his discipline, Weicks never contacted Ramirez to make another statement or add any new information regarding the incident. Tr., 1624:17-21 (Ramirez).

2. Analysis under *Wright Line*.

Weicks was legitimately disciplined in accordance with Athens' policies after he made a derogatory comment to his co-workers. The correct analysis for this situation based on Board precedent is under *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S.

393 (1983); *Bridgestone Firestone South Carolina*, 350 NLRB 526, 529 (2007). Under *Wright Line*, in order to prove a violation of the Act under Section 8(a)(3) and (1), the General Counsel has the initial burden to prove by a preponderance of the evidence that the employee's alleged union or protected activity was a motivating factor in the employer's decision to discipline him. *Bridgestone Firestone South Carolina*, 350 NLRB at 529; *United Rentals*, 350 NLRB 951, 951 (2007); *Merck, Sharp & Dohme Corp.*, 367 NLRB No. 122, at 3 (2019). The elements required to show this initial burden are "(1) union or protected concerted activity, (2) employer knowledge of that activity, and (3) union animus on the part of the employer." *Merck, Sharp & Dohme Corp.*, 367 NLRB No. 122, at 3 (citations omitted); *Bridgestone Firestone South Carolina*, 350 NLRB at 529 (citations omitted).

Only if the General Counsel is able to meet its burden, then "the burden of persuasion shifts to the employer to show that it would have taken the same adverse action even in the absence of the protected activity." *United Rentals*, 350 NLRB at 951; *Electrolux Home Products*, 368 NLRB No. 34, at 3 (2019) (citing *Wright Line*, 251 NLRB at 1089; also citing *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996), enfd. mem. 127 F.3d 34 (5th Cir. 1997)). The General Counsel failed to meet its initial burden in this case as it did not establish union animus. However, even if the General Counsel had met its burden, Athens would have disciplined Weicks for his derogatory comment towards co-workers even in the absence of his alleged protected activity. Accordingly, the allegation regarding Weicks at Paragraphs 13(a) and (c) of the Complaint should be dismissed.

a. <u>There is No Credible Evidence of Union Animus.</u>

The General Counsel did not present credible evidence to establish union animus regarding the legitimate discipline of Weicks and thus failed to meet its initial burden under *Wright Line*. Union animus is defined as "an 'intent to prejudice the employees' position because of their membership in the union.'" *Arc Bridges Inc. v. NLRB*, 861 F.3d 193, 196 (D.C. Cir. 2017) (quoting

NLRB v. Brown, 380 U.S. 278, 286 (1965)); see also *Merck, Sharp & Dohme Corp.*, 367 NLRB No. 122, at 5-6 (citing the D.C. Circuit's holding in *Arc Bridges Inc.* regarding union animus with approval). There was no credible evidence presented to establish that Weicks' discipline was intended to prejudice him because of his union membership or protected activities.

i. <u>No Basis for Union or Other Animus in this Case.</u>

There is simply no union animus here. The General Counsel attempts to claim that Weicks was disciplined for his union activities despite the fact that Weicks has not received any discipline prior to or after this event in April of 2018 even though he was a member of the bargaining team since November 2017 and has continued to be a known Union supporter. Tr., 389:6-15, 416:25-417:2, 419:21-420:22 (Weicks); 1617:12-14 (Ramirez). In fact, Weicks' was disciplined either the same or less harshly, depending on the circumstances, than other employees who have violated the Anti-Harassment Policy. Er. Ex. 16; GC Ex. 4.

While the General Counsel will argue that Lozano was not disciplined for using profanity, the testimony of Weicks regarding this incident was not credible. Luis Rubio, Lupe Ramirez, and Julio Porres all testified that Weicks never stated that Lozano used profanity that day. Tr., 1511:25-1512:10, 1516:8-14 (Rubio); 1617:25-1618:18, 1621:14-1622:3 (Ramirez); 1481:17-1482:5 (Porres). If Weicks had made a claim that Lozano called him a "motherfucker" then Ramirez would have investigated this claim. Tr., 1619:19-24; 1622:4-6 (Ramirez). Moreover, even if Lozano used the term "motherfucker," profanity is common in the yard, and Weicks himself has been heard using that specific term at work. 1482:6-1483:3 (Porres). Weicks comment on the other hand was both admitted and unrepentant. It also was demeaning and offensively segregated employees by class. Athens has consistently applied its Anti-Harassment Policy and Weicks did not receive any disparate treatment. This directly supports a finding of no union animus in this case.

Moreover, Athens always allowed employees to talk to the Union, Athens remained neutral, and there is no evidence of any manager or supervisor at the Peoria yard ever speaking negatively about the Union. Tr., 607:18-608:2 (Farris); 1552:2-9, 1554:6-1555:2, 1564:1-3 (Ramirez).

ii. <u>The General Counsel's Only Factual Claim for Animus is Not Credible and Does Not Establish Animus.</u>

The General Counsel attempted to imply animus through an alleged meeting between Ramirez and a terminated employee, Brendan Farris. However, Farris was a biased witness who believed that he should not have been terminated from Athens and was also good friends with Weicks. Tr., 602:11-19, 603:4-18, 1625:15-19 (Farris). Ramirez, a witness who had no evidence presented against her to show that she was biased or lacked credibility, testified that this meeting did not occur. Tr., 1627:18-1628:19 (Ramirez). Ramirez testified that she never asked Farris about Weicks' union activities and never asked him if Weicks was talking about the Union during working hours. Tr., 1627:17-23 (Ramirez). In fact, Ramirez would have had no reason to ask Farris about these topics as she never received any complaint or information about Weicks talking about the Union during working hours and thus would have no reason to investigate this. Tr., 1628:3-10 (Ramirez).

Importantly, even if a meeting did occur, based on the testimony of Farris, the meeting was only in regards to whether Weicks was promoting the Union while people were working. 609:10-610:2 (Farris). This would be a violation of both workplace rules and the LPA, and thus Ramirez would be permitted to conduct a lawful investigation regarding such accusations. *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 158-59 (2014) (holding that questioning of an employee was lawful when the employer was investigating the employee's complaints as well as complaints made against the employee by her co-workers); *St. Francis Regional Medical Center*, 363 NLRB

No. 69, fn. 2 (2015) ("employers may lawfully question employees as part of a lawful investigation into facially valid claims of misconduct, even if the alleged misconduct took place during the exercise of Sec. 7 rights."). Finally, the alleged meeting was not even in temporal proximity to the discipline. Accordingly, even if this alleged meeting occurred, which it did not, it would not establish union animus as it would have been a lawfully conducted investigation.

iii. Weicks' Allegations Are Not Credible.

Any alleged claims of animus in this case, as explained above, are patently false. Additionally, Weicks' allegations are not credible given that Weicks was provided with the opportunity to raise any issues he had at multiple bargaining sessions shortly after the incident, but he failed to do so.

In bargaining negotiations on April 6th, May 30th, and May 31st, 2018, employees on the bargaining committee (including Weicks) were given the opportunity to bring forward any complaints or issues they had with Athens. Tr., 2119:22-2120:1, 2122:20-23, 2123:6-11 (Torres); 2236:17-21, 2242:4-11 (Abrahms). The employees were assured that there would not be any repercussions for them speaking up and that the information would remain confidential. Tr., 2121:24-3 (Torres); 2239:7-20 (Abrahms). An open discussion occurred at each of these negotiation sessions where multiple employees spoke up about issues or complaints they had. Tr., 2122:4-6, 2123:15-17, 2124:1-2 (Torres); 2241:21-2242:8 (Abrahms). Moreover, Athens confirmed that they would continue to adhere to the LPA and that an investigation would take place. Tr., 2122:13-17, 2124:3-11 (Torres); 2239:21-25 (Abrahms).

At the May 30th and 31st sessions, Weicks did not claim that he was issued a written warning on April 19th for stating his co-workers were beneath him in retaliation for his union or protected activity. Tr., 2125:25-2126:3 (Torres); 2247:16-18 (Abrahms). Similarly, the Union did not raise any claim that Weicks was disciplined because of his union or protected activity. Tr.,

2126:7-10 (Torres); 2247:11-15 (Abrahms). Weicks did speak about other concerns at the negotiation sessions but he did not raise any concerns about his written discipline for violating Athens' Anti-Harassment Policy. Tr., 2126:11-16 (Torres); 2247:19-2248:8 (Abrahms). Thus, not only is there no proof of animus in this case but Weicks' motives are also suspect and his post-decertification allegations are not credible.

The General Counsel has not met its initial burden under *Wright Line* because it failed to prove union animus by the preponderance of the evidence. *Merck, Sharp & Dohme Corp.*, 367 NLRB No. 122, at 3, 6 (dismissing the complaint when the General Counsel failed to meets its initial burden under *Wright Line* by failing to establish union animus when the employer's adverse employment action was "a rational business decision and a reasonable strategy to apply leverage within the context of its ongoing bargaining relationships with several Unions."). *See also Electrolux Home Products*, 368 NLRB No. 34 (2019) (dismissing the complaint, despite a finding of pretext regarding disparate treatment in discipline, when the General Counsel failed to prove that the greater level of discipline given to the alleged discriminatee was due to animus). Accordingly, this allegation should be dismissed.

b. <u>There is No Credible Evidence of a Nexus Between Weicks' Discipline and his Union Activity.</u>

The General Counsel also did not present credible evidence to establish a nexus between Weicks' discipline and his union activity. Thus, even if the General Counsel had established union animus, which it did not, the allegation regarding Weicks' discipline should still be dismissed as "proving simple animus toward the union is not enough . . . . [T]he General Counsel must prove a connection or nexus between the animus and the [discipline], *i.e.*, that the discriminatory animus toward the employee's protected conduct was a substantial or motiving factor in the employer's decision to [discipline] him." *Tschiggfrie Props v. NLRB*, 896 F.3d 880, 886 (8th Cir. 2018)

(internal citations and question marks omitted) (citing previous Fifth Circuit precedent quoting *NLRB v. Transportation Mgmt.*, 462 U.S. 393, 401 (1983)).

In fact, there is no dispute that Weicks was disciplined for creating a hostile work environment by stating that his co-workers were "beneath" him. Weicks admitted this while testifying. Tr., 479:22-481:12, 405:21-23, 469:12-15 (Weicks). Moreover, this was accurately reflected in Weicks' disciplinary notice, which specified that "[t]he employee stated that certain employees were beneath him" and that "[t]his type of behavior and direct negative language is creating a Hostile work environment and is not acceptable per Athens Code of Conduct Policy. The company has a zero tolerance for this type of behavior." GC Ex. 4.

Weicks was disciplined in accordance with Athens' disciplinary policy and provided with an appropriate level of discipline for his actions. In fact, Weicks could have been assessed a higher level of discipline for his derogatory comment. Tr., 1570:4-8, 1616:-1617:2 (Ramirez). Athens' Progressive Discipline Policy is as follows:

> Violation of the Company's policies and rules may warrant disciplinary action. The Company has a system of progressive discipline that may include verbal warnings, written warnings, and suspension. The system is not formal, and the Company may, in its sole discretion, utilize whatever form of discipline is deemed appropriate under the circumstances, up to, and including, immediate separation of employment.

Jt. Ex. 57. Athens' Anti-Harassment Policy "applies to all persons involved in the operation of the Company and prohibits harassment, disrespectful, abusive or unprofessional conduct by any employee of the Company . . . ." Jt. Ex. 56. The Anti-Harassment Policy contains a non-exhaustive list of prohibited conduct that includes "[v]erbal conduct such as epithets, **derogatory** jokes or **comments**, slurs or unwanted sexual advances, invitations or comments." Jt. Ex. 56 (emphasis added). Weicks' statement to his co-workers indisputably was a derogatory comment in direct violation of Athens' Anti-Harassment Policy.

The General Counsel failed to present any credible evidence regarding a nexus between Weicks' discipline and any alleged union animus; rather, the evidence presented showed that Weicks' discipline had nothing to do with union or protected activity but was solely for his inappropriate actions. Accordingly, the allegations regarding the discipline of Weicks' should be dismissed.

c. <u>Athens Clearly Would Have Disciplined Weicks' for his Statement Even in the Absence of his Union or Protected Activity.</u>

Even assuming the General Counsel met its burden of proving that Weicks' alleged protected activity was a motivating factor in the Athens' decision to discipline him, this allegation must still be dismissed because Athens would have clearly disciplined Weicks' for his derogatory statement regardless of any union or protected activity. Under *Wright Line*, after the General Counsel has met its initial burden, the burden of persuasion shifts to the employer to demonstrate that it would have taken the same discipline even in the absence of the employee's protected conduct. *United Rentals*, 350 NLRB at 951; *Electrolux Home Products*, 368 NLRB No. 34, at 3 (citations omitted). As stated above, Weicks admitted that he made a derogatory comment to his co-workers by stating that they were "beneath" him. Tr., 405:21-23, 469:12-15 (Weicks). Additionally, Weicks testified that he was disciplined for creating a hostile work environment by making this statement. Tr., 479:22-481:12 (Weicks). Weicks' Written Disciplinary Notice reflects this. GC Ex. 4. Weicks' statement about his co-workers was in direct violation of Athens' Anti-Harassment Policy. Jt. Ex. 56. Weicks' discipline was consistent with both Athens policy and practice, both of which would have actually justified a more severe level of discipline. Tr., 1622:15-20, 1617:23-1617:2 (Ramirez). Thus, Weicks would have been disciplined for his derogatory statement even in the absence of any union or protected activity, as he violated Athens' Anti-Harassment Policy. Accordingly, the Employer has met its burden of persuasion and this

allegation regarding Weicks' discipline at Paragraphs 13(a) and (c) of the Complaint should be dismissed.

IV. ATHENS' LANO/PACOIMA YARD DID NOT VIOLATE THE ACT.

The Union and General Counsel allege that multiple violations of the Act occurred at Athens' Pacoima Yard. The various meritless claims include an allegations by employee Casildo Garcia, two allegations by employee Jose Maldonado, allegations of surveillance, and allegations resulting from the Union's trespass. These allegations were shown to be nonsensical, false, and without merit.

A. Athens Did Not Threaten Casildo Garcia.

The Union and General Counsel allege that Athens violated Section 8(a0(1) of the Act by threatening Casildo Garcia with termination if he did not sign a decertification petition. This allegation was shown to be outlandish, lacking any credible factual support, and meritless.

1. The Testimony of Casildo Garcia was Not Credible.

The testimony of Casildo Garcia ("Garcia") was not credible for various reasons as he contradicted himself on multiple occasions, made illogical claims, and his testimony was refuted by a video presented by the General Counsel and another General Counsel witness. Garcia claimed that he is neither for nor against the Union. Tr., 38:6-7 (Garcia). Nonetheless, he eventually admitted that he got a ride to the Hearing from an individual from the Union. Tr., 45:21-46:11. Garcia's testimony regarding his ride to the Hearing was evasive. When asked how he got a ride to the Hearing Garcia responded with "I got a ride from a guy." Tr., 45:21-25 (Garcia). Yet, he did not know the person's name. Tr., 46:1-2 (Garcia). However, he admitted that he knew the man from the Union and that he met him at the Union. Tr., 46:7-11 (Garcia). Moreover, Teamsters Organizer Gilberto Lopez testified that Garcia is "a regular" and that Garcia "always stops by [the Union tent] on his way home." Tr., 820:16-23 (Lopez).

a. Garcia's Testimony Regarding a July 12, 2018 Incident Was Not Credible.

Garcia was exposed as lying during his testimony regarding an incident in July of 2018. He claimed that while leaving work around 5:00 PM, Security Guard Kala "Q" Furquan ("Q") grabbed his vest and said to him, in English, that he could not be talking to the Union while wearing his vest. Tr., 41:18-42:1 (Garcia). Garcia does not speak or understand English, but he claimed he understood that he was not supposed to talk to people while wearing his vest simply because Q grabbed his vest. Tr., 41:16-42:1 (Garcia). Garcia doubled down on this statement during cross examination, when he claimed that he knew, without understanding what Q was saying, that he was not allowed to talk to people from the Union in his Athens' vest simply because Q pulled at his vest. Tr., 51:21-52:3 (Garcia). Garcia's exact words were as follows:

> I'd only said hello to two of the [union] guys when the guard started to yell at me. I didn't understand what he was saying so I turned to face him to say, you know, what's going on, and that's when he grabbed my vest. And I say, I couldn't talk to people in my vest.

Tr., 51:20-24 (Garcia). However, the video presented by General Counsel during the Hearing shows the entire interaction and stands in stark contrast to this testimony as it clearly shows that Garcia was not touched by Q. GC Ex. 14(d). Rather, it shows that Garcia is drinking a soda while having a conversation with employees of the Union and that he is never close to Q. GC Ex. 14(d). Indeed, it shows Q approaching from the gate, having a conversation with the Union organizers and then returning behind the gate without touching or even talking to Garcia. Additionally, Teamsters Organizer Lopez testified that when Garcia was talking to the Union, Q came outside but they stood in-between Q and Garcia. Tr., 821:1-5 (Lopez). This testimony by Lopez accurately reflects what was shown in the video. GC Ex. 14(d). Moreover, it is clear from both the testimony of Lopez and the video that Q walked away after this and was always a significant distance away

from Garcia. GC Ex. 14(d); Tr., 821:24-25:1 (Lopez). Thus, there is no possible way that Q grabbed Garcia by the vest at any point. GC Ex. 14(d); Tr., 821:24-25:1 (Lopez).

Moreover, as Garcia testified that he was only at the Union tent for a short while and only had one interaction with Q, it is clear that the video reflects what actually happened. Accordingly, seeing how Garcia does not speak or understand English and Q clearly did not grab Garcia's vest, there was no way for Garcia to know that Q was telling him not to speak to the Union while wearing his vest. Thus, the only logical conclusion is that Garcia's entire testimony regarding July 12, 2018, was fabricated and prompted by the Union. Moreover, Garcia was not truthful on the stand and he is not a credible witness with respect to any of his testimony.

b. Garcia's Testimony Regarding an Alleged Incident Between Him and Assistant General Manager Solis is not Credible.

Garcia's testimony regarding an alleged event between him and Pacoima Yard Assistant General Manager Tomas Solis ("Solis") in early 2018 is also not credible. His testimony regarding this alleged incident should be rejected based on his lack of credibility already demonstrated. When coupled with the credibility gaps in the story itself, the accusation most certainly must be rejected.

Garcia's testimony was clearly fabricated and prepared ahead of time. When asked who his employer was, Garcia responded "Mr. Tomas Solis at the Athens Company." Tr., 37:15-16 (Garcia). It is not a natural response for an individual to name their Assistant General Manager as their employer. Moreover, this is even more bizarre given that Garcia testified that he did not know what position Tomas Solis had at Athens. Tr., 38:13-16 (Garcia). Additionally, when asked if he knew the Teamsters Union, Garcia responded "Mr. Tomas mentioned it to me." Tr., 38:4-5 (Garcia). Again, it is implausible that the only reason an employee at the Pacoima Yard, a yard containing over 250 employees, knew about the Union was because the Assistant General Manager of that yard had mentioned it to him. Additionally, as stated previously, Teamsters Organizer

Lopez testified that Garcia was a "regular" and that he always stopped by the Teamsters tent when he was leaving work. Garcia was clearly coached to use the name Tomas Solis repeatedly during his testimony in a failed attempt to bolster his credibility regarding this allegation.

Garcia's testimony regarding this alleged incident was that he was leaving work in early 2018 when he was approached by Solis as he was walking to the parking lot. Tr., 38:20-39:3 (Garcia). Garcia testified that Solis asked him, in Spanish, to sign a piece of paper that Solis had in his office. Tr., 39:4-8 (Garcia). Solis allegedly stated that this paper was regarding not joining the Union. Tr., 39:11-13 (Garcia). Garcia asked Solis what would happen if he did not sign the paper, and Solis allegedly stated that "he would take [Garcia's] neck." Tr., 40:2 (Garcia). According to Garcia, this meant that Solis would fire Garcia. Tr., 40:3-5. Garcia then simply responded that he would wait and see if "he took my neck," and then went home. Tr., 40:9-13 (Garcia).

Garcia first testified that he was not sure if anyone else was around during this alleged interaction. Tr., 40:25-41:2 (Garcia). However, on cross, Garcia testified that he was alone. Tr., 47:9-12 (Garcia). Subsequently, after responding that "I didn't tell anyone at the Union anything," when asked when he first told the Union about this incident, Garcia stated that he was contacted because "there were other people standing around" during the interaction. Tr., 47:23-25; 48:1-3 (Garcia). Thus, Garcia changed his testimony twice in a matter of minutes and indicated that he never told the Union about this incident but apparently some other people, who he does not know, told the Union. On follow up, Garcia testified that he did not know who these people were that witnessed the alleged interaction because he was just paying attention to Solis. Tr., 48:3-4 (Garcia). Garcia's testimony over what he described as a "very short, very short" interaction is

convoluted, confused, and clearly fabricated. Tr., 40:22-24 (Garcia). Garcia's testimony is simply self-contradictory and not credible.

In addition to being self-contradictory, Garcia's testimony does not reflect reality. Although he was allegedly told by the Assistant General Manager of his employer that he would "take his neck" and possibly lose his job, Garcia did not seem to care. He simply told his Assistant General Manager that he would wait and see, and then the conversation ended. Tr., 40:9-13 (Garcia). Moreover, the allegation that Solis told him he would "take his neck" is outlandish and simply not credible.

Furthermore, it is illogical that a high ranking manager at the Pacoima Yard would accost a single employee while leaving work in order to get them to sign a piece of paper stating they will not join the Union. There are no allegations or evidence presented to show that Solis did this to any other employee. Thus, the General Counsel is implicitly arguing that the Assistant General Manager of the Pacoima Yard decided to target a single employee, but no other employees, out of over 250 employees to sign a decertification petition. Moreover, as testified to by the Union itself, Solis allegedly targeted an employee who was a "regular" with the Union. This is irrational.

The testimony of Garcia was not credible. His statements themselves were contradictory and illogical, and many of his key claims were contradicted by video evidence and the testimony of a Union Organizer. Despite his statement that he is not for or against the Union, it is clear that Garcia is for the Union and that his testimony was fabricated to benefit the Union. Simply stated, Garcia is not a credible witness.

Thus, there was no credible evidence presented to support a claim that Solis threatened Garcia with discharge if he did not support a petition to decertify the Union. Accordingly, the

allegation regarding an alleged incident between Garcia and Solis in early 2018 should be dismissed.

2. The Testimony Of Tomas Solis Was Credible.

While the testimony of Garcia was self-contradictory, illogical, and not credible, the testimony of Solis was credible, logical, and consistent. Solis has never stopped Garcia to ask him to sign any piece of paper, let alone something related to the Union. Tr., 1860:3:7, 1860:20-24 (Solis). Moreover, if Garcia needed to sign a paper, Solis would not ask him to do this himself. Tr., 1860:8-19, 1861:12-19 (Solis). Rather, a lower level supervisor or manager would have asked Garcia to sign the paper. Tr., 1860:8-19 (Solis). Solis did not say to Garcia, or any other person, that he would "take their neck." Tr., 1862:3-8, 1862:13-19 (Solis). Moreover, Solis has never threatened to terminate someone. Tr., 1862:18-1863:2 (Solis). Solis has never even had a conversation with Garcia regarding the Union. Tr., 1863:4-6 (Solis). Lastly, Solis has never asked an employee to sign any kind of paper to get rid of the Union. Tr., 1863:7-9 (Solis).

Solis testified clearly that this alleged interaction between him and Garcia regarding signing a piece of paper never occurred. His testimony, both on direct and cross, did not waiver and resolutely showed that this alleged conversation between him and Garcia did not occur. Tomas Solis was a credible witness.

Accordingly, the allegation that Solis threatened Garcia with discharge if he did not support a petition to decertify the Union, under Paragraph 6 of the Complaint, should be dismissed.

3. The Allegation Regarding an Alleged Conversation between Solis and Garcia is Time-Barred.

Although Garcia's allegation against Solis should be dismissed for the reasons stated above, it should also be dismissed because it is time barred. Even though Garcia could apparently remember exactly what happened during this alleged interaction with Solis, he struggled to

remember the date or even the season that the incident occurred in. On direct, Garcia did not identify the month that the alleged incident occurred in on his own. Tr., 38:8-12 (Garcia). Rather, when guided by the General Counsel who asked if he remembered having a conversation with a manager about the Union in March or April, he answered in the affirmative. Tr., 38:11-12 (Garcia). Nonetheless, he testified on cross that he could not remember the exact date of this alleged interaction but that it could have occurred in January of 2018. Tr., 47:13-8 (Garcia). As stated above, and shown again here, Garcia's testimony is clearly not credible.

Section 10(b) of the Act states that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . . ." Nat'l Labor Relations Act § 10(b). This allegation was not brought forth until the First Amended Charge in Case 31-CA-223801. GC Ex. 1(d). The First Amended Charge was not received by Athens until November 2, 2018. GC Ex. 1(e)-(f). Even if it is assumed that this alleged incident occurred in March or April of 2018, this allegation should be dismissed because it is outside the required six month time period.

The General Counsel will most likely argue that this allegation was brought forth in the Original Charge. GC Ex. 1(a). However, the Original Charge makes no mention of Solis or of any threat being made to an employee. GC Ex. 1(a). This is only found in the First Amended Charge. GC Ex. 1(d). Nonetheless, the Original Charge was received by Athens on July 17, 2018. GC Ex. 1(b)-(c). Thus, considering Garcia's testimony that this incident could have occurred in January of 2018, this allegation is still time barred even if it is decided that the allegation is in the Original Charge, which it is clearly not. GC Ex. 1(a). Consequently, the allegation and Paragraph 6 of the Complaint must be dismissed.

B. Martorana Did Not Create the Impression that He Was Watching Jose Maldonado or Other Employees' Union Activities.

Jose Maldonado alleged that on July 12, 2018, while he was helping another employee take down the flag, Mark Martorana walked up to him and said "if [you] give the Union 30 minutes, then [you] got to give the company their 30 minutes." Tr., 81:3-20, 82:23-24 (J. Maldonado). Jose Maldonado alleged that he responded by saying that was fine and that was the end of the conversation. Tr., 83:1-12 (J. Maldonado). Moreover, according to Jose Maldonado, there was never any further discussion about this statement and nothing occurred based on this short discussion. Tr., 166:17-167:1 (J. Maldonado). Neither the evidence nor the law support this allegation.

1. The Testimony of Jose Maldonado Was Not Credible.

It is illogical to believe that this statement actually occurred. The statement is nonsensical, seeing how Jose Maldonado was on the bargaining committee and was often released for bargaining sessions between the Union and Athens, and thus Jose Maldonado had spent much more than 30 minutes prior to this event speaking with the Union. Tr., 162:6-15 (J. Maldonado); Jt. Ex. 62. In fact, Jose Maldonado attended every single bargaining session between Athens and the Union. Tr., 106:8-12, 147:24-148:5 (J. Maldonado); Jt. Ex. 62.

Moreover, Jose Maldonado's short testimony regarding this incident was inconsistent. Originally, Jose Maldonado testified that he had been talking to the Union earlier that day before he clocked in for work. Tr., 83:5-6, 160:11-19, 172:21-25 (J. Maldonado). In fact, Jose Maldonado reiterated this three separate times during his testimony. *Id.* However, after being confronted with his affidavit, which stated that he did not speak to the Union until lunch (some hours after this alleged incident), Jose Maldonado admitted that his previous testimony was based on what he thought might have happened. Tr., 173:17-174:6 (J. Maldonado). Thus, even though

this alleged conversation took no more than a couple of minutes, if that, Jose Maldonado was unable to testify clearly and consistently about the alleged statements.

This was not the only time that Jose's testimony contradicted his affidavit. During his testimony, Jose Maldonado was asked if he considered the Shop Manager at Pacoima, Mark Martorana, to be his direct supervisor. Tr., 106:23-24 (J. Maldonado). Jose Maldonado stated that it was Mark Martorana and two other individuals, Richard Gonzales and Eric Zufall. Tr., 106:23-25 (J. Maldonado). However, in his affidavit, Jose Maldonado stated that Martorana was his direct supervisor and he did not list anyone else. Tr., 107:1-14 (J. Maldonado). The Union and General Counsel had tried in the beginning to place blame on Gonzalez, whom the General Counsel now admits was not even a supervisor in 2018. Jose Maldonado's self-serving yet contradictory statements clearly sought to support the Union's frivolous allegations regarding these other two individuals but was shown to be false based on his previous affidavit.

Moreover, there were other incidents throughout Jose Maldonado's testimony in which he was either impeached, directly contradicted, or made illogical claims. As explained in greater detail below, on August 2, 2018, the Union trespassed into the Pacoima Yard and met with the shop employees in the Training Room. *See* Section IV. E.1; Er. Ex. 23. Martorana followed the Union representatives into the Training Room and asked the shop employees when they had clocked out for lunch. Er. Ex. 23. The employees, including Jose Maldonado, stated that they had clocked out at 6:30 PM. Er. Ex. 23; Tr., 1781:19-20, 1786:7-10 (Martorana). However, Jose Maldonado had actually clocked out at 5:58 PM and clocked in at 6:28 PM. Er. Ex. 18; Er. Ex. 22. Thus, Jose Maldonado was caught red-handed lying to his manager.

During cross examination, Jose Maldonado attempted to cover his tracks regarding this incident by making the ludicrous claim that Athens allows its employees to take an hour lunch, but

only being clocked out for 30 minutes, by combining their 15 minute breaks with their lunch break. Tr., 202:25-203:4 (J. Maldonado). Jose Maldonado was unable to articulate why he did not mention this during his direct examination when he had testified that his break was only 30 minutes long. Tr., 239:25-240:8 (J. Maldonado). Regardless, this does not actually change the situation, as even if this was true, which it is clearly not, Jose Maldonado still lied to Martorana when he said he started his lunch at 6:30 when in fact it started at 5:58 and when he stated he was clocked out when in fact he was clocked in. Moreover, this testimony was directly refuted by HR Manager Ramirez who even smiled when asked if employees can combine their rest breaks with their meal breaks because "that's completely not our policy that they should be doing that." Tr., 1648:10-16 (Ramirez). Ramirez testified that this is explained to employees and she has never heard of a directive to Shop employees that they could ignore the Company policy regarding not combining rest periods. Tr., 1648:17-22 (Ramirez). Jose Maldonado clearly has no compunction about lying to advance his and the Union's interest.

The overall testimony of Jose Maldonado is not credible. Moreover, Jose Maldonado's testimony regarding the alleged statement by Martorana contradicted his affidavit and was simply illogical. Accordingly, this allegation, at Paragraph 9 of the Complaint, should be dismissed.

2. <u>It Is Not Believable that Martorana Would Make this Statement.</u>

Martorana has remained committed to the LPA between Athens and the Union, and to the commitment to remain neutral regarding the Union. Tr., 1731:15-1732:14 (Martorana). Martorana understands and believes that no one should be held responsible for their support or lack of support for the Union, and that employees cannot be disciplined for their Union activities. Tr., 1732:15-20 (Martorana). Martorana also understands that if he violated the LPA that there would be consequences and he would be subject to possible termination. Tr., 1732:21-1733:2 (Martorana).

Jose Maldonado's own testimony reflects that Martorana has acted properly regarding the Union. Jose testified that Martorana never said anything negative to him about the fact that he would talk to the Union, never told him not to talk to the Union, and never threatened him for talking with the Union. Tr., 164:9-16 (J. Maldonado). Thus, the only statement that Martorana ever allegedly said to Jose Maldonado about the Union was this nonsensical out of place comment that if he talked to the Union for 30 minutes then he had to give the Company 30 minutes. Tr., 164:17-20 (J. Maldonado). This goes to show that the alleged statement never occurred. There would be no reason for Martorana to make this statement and, according to the testimony of Jose Maldonado, it is not in line with any of Martorana's previous or later actions.

Accordingly, for the reasons stated above, this allegation regarding an alleged statement made by Mark Martorana to Jose Maldonado, at Paragraph 9 of the Complaint, should be dismissed.

3. <u>Even If this Statement Was Made, Which It Was Not, It Does Not Indicate Surveillance.</u>

The alleged statement, if made, was clearly a joke. Jose Maldonado himself testified that he did not take the statement seriously; thus, he did not believe that he would actually have to talk to Martorana for 30 minutes. Tr., 165:6-19 (J. Maldonado). Jose Maldonado testified that he had not talked to the Union for 30 minutes that day and he did not know what Martorana was referring to. Tr., 161:20-24 (J. Maldonado). In fact, when asked what he took this statement to mean, Jose Maldonado replied that "I didn't think nothing of it." Tr., 162:1-3 (J. Maldonado). Thus, there was no impression of surveillance created based on this alleged statement by Martorana.

Furthermore, as Jose Maldonado had not met with the Union for 30 minutes, or any amount of time, that day and the alleged statement by Martorana began with "if," there is no implication that any activities were being tracked. "If" is a speculative statement and in the context goes to

show that Martorana was unaware of whether Jose would be meeting with the Union or not. Thus, the statement, even if believed, actually indicates that there was no surveillance as the Employer was unaware of if Jose Maldonado would even meet with the Union.

Importantly, Jose Maldonado understood the statement to mean that "once my 30 minutes are up, then I've got to get back to work and I can't talk to the Union." Tr., 162:19-23 (J. Maldonado). This statement would not indicate any form of surveillance or animus. Rather, this statement would be in line with the LPA as the employees at Athens know that they are only allowed to speak to the Union when on non-working time. Jose Maldonado himself testified to this. Tr., 156:17-22 (J. Maldonado).

Lastly, when Jose Maldonado would speak with the Union, it was out in the open in front of everyone. Tr., 163:13-20, 164:5-8, 166:8-16 (J. Maldonado). The Board applies an objective test to determine "whether an employer engages in unlawful surveillance or unlawfully creates the impression of surveillance," in which it evaluates "whether the employer's conduct, under the circumstances, was such as would tend to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed under Section 7 of the Act." *The Broadway*, 267 NLRB 385, 400 (1983) (citation omitted). It is well established that, under this test, an employer's routine observation of open, public protected activity on or near a company's premises does not constitute unlawful surveillance or create an unlawful impression of surveillance. *Aladdin Gaming LLC*, 345 NLRB 585, 586 (2005) (citation omitted); *Wal-Mart Stores, Inc.*, 350 NLRB 879, 883 (2007) (citations omitted). As admitted by Jose Maldonado, any alleged observation by management of Jose Maldonado speaking to the Union was done out in the open. This does not create an unlawful impression of surveillance under Board law. Moreover, as an open Union supporter and member of the bargaining team, it is simply inconceivable that this alleged "joke" which Jose Maldonado

"didn't think nothing of" could tend to interfere, restrain, or coerce Jose Maldonado. Thus, there was no impression of surveillance here and this allegation should be dismissed.

C. Jose Maldonado's Verbal Warning Did Not Violate the Act.

The Union and General Counsel allege that Athens violated Section 8(a)(1)[24] of the Act when it provided Jose Maldonado with a verbal warning for his no-call/no-show on May 19, 2018. This allegation is meritless.

1. Relevant Facts.

a. Tire Mechanic Saturday Schedule 2018

In 2018, there were two tire mechanics at the Pacoima Yard: Jose Maldonado and David Maldonado. Tr., 248:8-11 (D. Maldonado). Although the General Counsel and Union assert that tire mechanics worked a fixed rotating schedule, the evidence established that was not the case. Tr., 115:9-17 (J. Maldonado); 1740:13-17, 1758:22-1759:5 (Martorana); Er. Ex. 19. Rather, the default rule was that both tire mechanics, Jose Maldonado and David Maldonado, would both work on Saturdays. Tr., 115:9-17 (J. Maldonado); 1740:13-17, 1758:22-1759:5 (Martorana); Er. Ex. 19. If Jose Maldonado or David Maldonado wanted to take a Saturday off, it was up to them to work that out amongst themselves. Tr., 115:22-116:5 (J. Maldonado); 318:5-16 (D. Maldonado). In fact, the Company would not know if one of the tire mechanics would take the day off until Jose Maldonado or David Maldonado contacted a superior or manager. Tr., 116:6-9 (Jose Maldonado). Nonetheless, management expected at least one of them to work on Saturdays. Tr., 324:8-9, 252:23-253:11 (D. Maldonado); 126:22-127:3 (J. Maldonado); 1743:2-5, 1799:15-16, 1801:11-15 (Martorana). The attendance of the tire mechanics was important as there were only two of them

[24] Neither the General Counsel nor the Complaint allege that Jose Maldonado's verbal warning was a violation of 8(a)(3). Thus, there can be no finding of an 8(a)(3) violation. Nonetheless, the General Counsel may argue the verbal warning constitutes an 8(a)(3) violation. Consequently, Respondent establishes herein that the General Counsel cannot meet its burden to prove a violation of 8(a)(3) and certainly, if it cannot meet that burden because the discipline was lawful, it also cannot establish any violation of 8(a)(1).

and they performed the essential job of making sure the tires were operational on all vehicles at the Pacoima Yard. Tr., 109:7-15, 110:15-18 (J. Maldonado).

If Jose Maldonado was unable to work a Saturday he would contact his superior. Tr., 63:14-64:3 (J. Maldonado). He would get a response asking if David Maldonado knew that he was taking that Saturday off. Tr., 64:6-9 (J. Maldonado). The reason for this was to ensure that the "Saturday was covered;" *i.e.*, there was at least one tire mechanic working each Saturday. Tr., 64:8-9 (J. Maldonado). Similarly, David Maldonado would contact his superior if he was going to miss a Saturday. Tr., 255:1-11, 255:19-25, 319:19-320:19 (D. Maldonado). David would need to receive a response in order to be able to miss that Saturday. Tr., 255:12-18 (D. Maldonado). Tr., 1745:12-17, 1746:11-17 (Martorana).

b. <u>Athens Company Event in May of 2018.</u>

Athens decided that they would have an open-house event for the employees at the Pacoima Yard in May of 2018. Tr., 1743:19-25 (Martorana). The event was going to be held in the Shop, so it was necessary for the Company to change the Shop schedule for that Saturday. Tr., 1744:3-8 (Martorana). The Shop employees were given the choice to either all work Saturday after the event or to all work on Sunday morning. Tr., 1744:12-17 (Martorana). This was first explained to the employees at a weekly safety meeting held on April 12, 2018. Er. Ex. 20; Tr., 1745:12-1746:4, 1746:11-16 (Martorana). A vote was not held at this point regarding if the employees would work Saturday, after the event or Sunday. Tr., 1747:5-8 (Martorana).

At another weekly safety meeting held on May 10, 2018, Martorana took a vote of the employees to see what day they would work the weekend of the Company event. Er. Ex. 21; Tr., 1747:23-25, 1749:2-8 (Martorana).[25] Martorana let the employees know that they would all work

[25] Jose Maldonado attended both of these safety meetings. Tr., 1748:22-23, 1746:5-10 (Martorana); Er. Ex. 20; Er. Ex. 21.

whatever the majority decided. Tr., 1748:4-5 (Martorana). The majority voted to work Saturday after the event finished. Tr., 1748:1-9 (Martorana). Once the schedule was set, Martorana let everyone know that he needed "all hands on deck" for that Saturday. Tr., 1749:16-1750:8 (Martorana). Thus, Martorana expected everyone to be there for work Saturday after the event. Tr., 1750:9-11 (Martorana).

At some point after this safety meeting, Jose Maldonado came to Martorana's office with some other employees to confirm that they were working on Saturday. Tr., 1750:12-23 (Martorana). Jose Maldonado asked Martorana if they were working on Saturday. Tr., 1751:3-10 (Martorana). Martorana responded by saying "yes, Jose, the majority wanted Saturdays [sic], so that's what we're going to do." Tr., 1752:1-5 (Martorana). After receiving this confirmation, Jose Maldonado left Martorana's office. Tr., 1752:6-11 (Martorana). It is undisputed that Martorana was not upset, angry, or disturbed by the inquiry. Tr., 1752:12-18 (Martorana); 138:2-4, 143:14-17 (J. Maldonado); 338:9-13 (D. Maldonado). Rather, he quickly and without objection confirmed that they would be working Saturday after the event. Tr., 1752:3-8 (Martorana); 70:12-13, 137:19-23 (J. Maldonado); 337:23-338:3 (D. Maldonado).

c. <u>Jose Maldonado and David Maldonado Did Not Show Up for Work the Saturday of the Company Event and Were Properly Disciplined for a No-Call/No-Show.</u>

Both Jose Maldonado and David Maldonado failed to show up for work on Saturday, May 19, 2018, the day of the Company event. Tr., 1753:8-10 (Martorana). This meant that there were no tire mechanics present on Saturday May 19th. Tr., 1759:15-19 (Martorana). In fact, a number of employees did not show up that Saturday. 1753:11-13 (Martorana). Martorana checked with the supervisors to see whether the employees who did not show up on Saturday called in and provided notice that they would not be in per Company policy. 1753:18-24 (Martorana). Martorana did this to check and see who properly called in and notified the Company that they

would be absent and who would be disciplined for a no-call/no-show. Tr., 1754:1-9 (Martorana). Martorana received information that some of the employees properly called in to notify the Company of their future absence while other employees did not. Tr., 1754:10-15 (Martorana). Martorana decided to issue corrective action for a no-call/no show for the employees that did not show up on Saturday and did not call in beforehand. Tr., 1754:16-19 (Martorana); GC Ex. 2; GC Ex. 3; Er. Ex. 15. This included both Jose Maldonado and David Maldonado. Tr., 1754:20-23, 1759:20-1760:2 (Martorana); GC Ex. 2; GC Ex. 3. This also included other employees. Er. Ex. 15.

On May 22, 2018, David Maldonado received a verbal warning for a no-call/no-show. GC Ex. 3. Martorana met with David Maldonado to give him his discipline. Martorana told David Maldonado that he did not show up to work on Saturday and that he did not reach out to anybody to let them know he would not be at work. Tr., 1756:12-17 (Martorana). David Maldonado simply responded that he was sorry for not showing up to work. Tr., 343:16 (D. Maldonado); 1756:18-22 (Martorana). David Maldonado did not mention to anyone during this meeting that it was his Saturday to work. Tr., 269:21-22; 343:13-22; 344:7-9 (D. Maldonado).

That same day, Jose Maldonado received a verbal warning for a no-call/no-show. GC Ex. 2. Martorana told Jose Maldonado that he was receiving a discipline for failing to show up to work on Saturday but Jose Maldonado claimed that it was his day off. Tr., 1757:8-13 (Martorana). Martorana explained to Jose Maldonado that he told everyone that they needed to be there. Tr., 1757:14-17 (Martorana). Additionally, Martorana looked at the timekeeping system and told Jose Maldonado that he had taken the previous two Saturdays off. Tr., 1757:20-24 (Martorana). After reviewing a calendar, Jose Maldonado stated that he thought he made a mistake. Tr., 1758:1-7 (Martorana). After that, Jose Maldonado signed the discipline form without asking any additional

questions. Tr., 1758:8-9 (Martorana); GC Ex. 2. Notably, although provided the opportunity, Jose Maldonado did not write any objection or comments in the space provided on the disciplinary form. *Id.*

2. Analysis under *Wright* Line.

Jose Maldonado was legitimately disciplined in accordance with Athens' policies after he failed to call in for a scheduled shift. As noted above, *Wright Line* is the controlling standard here. *See supra* Section III. A.2. Again, under *Wright Line*, the General Counsel has the initial burden (based on the factors discussed above) to prove that the employee's alleged union or protected activity was a motivating factor in the employer's decision to discipline him. *See supra* Section III. A.2.

The General Counsel failed to meet its initial burden in this case as it did not establish union animus or that any protected activity motivated this minor discipline. However, even if the General Counsel had met its burden, Athens would have disciplined Jose Maldonado for his no-call/no-show on Saturday, May 19, 2018, even in the absence of his alleged protected activity. Accordingly, the allegation regarding Jose Maldonado at Paragraph 8 of the Complaint should be dismissed.

a. The General Counsel Failed to Prove Athens Perceived Any Protected Activity by Jose Maldonado or to Prove Knowledge of Protected Activity.

The General Counsel did not present any credible evidence that any alleged protected activity was perceived by Athens and thus failed to meet its initial burden under *Wright Line*. The General Counsel, in Paragraph 8(a) of the Complaint, claims that the protected activity was that Jose Maldonado allegedly "request[ed] a change to the weekend work schedule to management on behalf of all shop employees." However, the credible evidence presented stands in contrast to this allegation. Jose Maldonado did not enter into Martorana's office to ask for the weekend shift to

be changed but rather entered into the office to confirm with Martorana that the employees were scheduled to work on Saturday, not Sunday. Tr., 1750:12-23 (Martorana). Moreover, this had already been decided in the safety meeting when the majority of Shop employees voted to work on Saturday, rather than Sunday. Tr., 1748:1-9, 1752:1-5 (Martorana).

Jose Maldonado made the claim that after the safety meeting he was allegedly told by Supervisor Zufall that the Shop employees had to work on Sunday.[26] However, as explained above and in more detail below, Jose Maldonado's testimony is not credible as a majority of his testimony was affirmatively impeached and many of his allegations, including this one, are simply illogical. *See* Sections IV. B.1. and C. 2.b.ii.

Most important, as noted above, it is undisputed that Martorana did not object or raise any concerns regarding Jose Maldonado's schedule inquiry, but rather perceived it merely as confirmation of what had already been decided and announced. Given that Jose Maldonado was not seeking any change and Martorana was merely confirming his decision, Jose Maldonado was actually not engaged in concerted protected activity and, certainly, Martorana did not perceive him to be and thus could not have had "knowledge" that Jose Maldonado allegedly believed he was engaged in concerted activity. *Reliable Disposal, Inc.*, 348 NLRB 1205 (2006).

Therefore. Jose Maldonado's account of his alleged protected activity is not credible and stands in contrast to more credible evidence. Accordingly, the General Counsel failed to meet its burden regarding *Wright Line* and this allegation should be dismissed.

[26] Jose Maldonado testified that he could not recall if Martorana gave the option of the employees to work on Saturday or Sunday during the safety meeting. Tr., 67:5-9 (J. Maldonado).

b. There is No Union Animus on the Part of the Employer.

The General Counsel did not present credible evidence to establish union animus regarding the legitimate discipline of Jose Maldonado and thus once again failed to meet its initial burden under *Wright Line*.

i. No Basis for Union or Other Animus in this Case.

Union animus is defined as "an 'intent to prejudice the employees' position because of their membership in the union.'" *Arc Bridges Inc. v. NLRB*, 861 F.3d 193, 196 (D.C. Cir. 2017) (quoting *NLRB v. Brown*, 380 U.S. 278, 286 (1965)); see also *Merck, Sharp & Dohme Corp.*, 367 NLRB No. 122, at 5-6 (citing the D.C. Circuit's holding in *Arc Bridges Inc.* regarding union animus with approval). There was no credible evidence presented to establish that Jose Maldonado's discipline was intended to prejudice him because of his Union membership or protected activities.

There is no basis for union animus in this case. Jose Maldonado has been involved with the Union since the early stages of the Union's organizing of the Pacoima Yard. Tr., 107:24-108:2 (J. Maldonado). Moreover, Jose was never shy about his involvement in the Union's organizing efforts. Tr., 108:3-7 (J. Maldonado). Jose Maldonado has attended every bargaining session between Athens and the Union. Tr., 106:8-12, 147:24-148:5 (J. Maldonado); Jt. Ex. 62.

The General Counsel illogically claims that Jose Maldonado was all of a sudden disciplined in May of 2018 because of his alleged protected activity related to him seeking confirmation of the post-event schedule. This ignores the fact that Jose Maldonado had been heavily involved in the Union for around two years prior to this incident and he only received this single, low-level discipline, and one other (pre-organizing) discipline in 2016 for a tire falling off a truck. Tr., 78:17-25 (J. Maldonado). Jose Maldonado himself testified that no one has ever said anything negative to him about his Union activities or given him a negative disciplines or attendance marks

for participating on the bargaining team. Tr., 109:1-6 (J. Maldonado). He also testified that Martorana did not object or express any hostility related to his inquiry confirming the Saturday schedule. Tr., 70:12-13, 137:19-23, 138:2-4, 143:14-17 (J. Maldonado).

Moreover, Athens, particularly Martorana, had the opportunity to justifiably discipline Jose Maldonado on another occasion but decided to show him leniency. On August 2, 2018, Union representatives trespassed into the Pacoima Yard in an attempt to meet with the shop employees. *See* Section IV. E. 1.; *see also* Er. Ex. 23. Martorana attempted to stop the Union representatives but they continued all the way until they reached the Training Room where multiple shop employees were sitting. Martorana, believing that the Shop employees should have already finished lunch, asked what time they clocked out. Er. Ex. 23; tr., 1781:12-18 (Martorana). The employees, including Jose Maldonado, stated they clocked out at 6:30 PM. Er. Ex. 23; tr., 1781:19-20, 1786:7-10 (Martorana). Nonetheless, the time records for August 2nd show that Jose Maldonado clocked out at 5:58 PM and clocked back in at 6:28 PM. Er. Ex. 18; Er. Ex. 22. Thus, Jose Maldonado lied to management and committed timecard fraud. However, Martorana decided to not discipline the employees who were caught red-handed lying about being clocked off for lunch, including Jose Maldonado. Tr., 1786:14-19 (Martorana). Consequently, if Athens was seeking to discipline Jose Maldonado, they had legitimate ways to do so. Yet, they decided to be lenient. These are not the actions of a manager or employer with union animus.

Finally, Jose Maldonado's allegation that his discipline related to alleged protected activity is not credible given that Jose Maldonado was provided with the opportunity to raise any issues he had at multiple bargain sessions shortly after the incident but he failed to do so.

Jose Maldonado attended a bargaining session on May 30, 2018, in which Jay Phillips stated across the bargaining table that he had several different complaints related to allegations

about the way Athens had conducted itself. Tr., 148:6-149:20 (J. Maldonado). Phillips encouraged everybody who was there that day to express anything that they felt had happened to them that they felt was unfair. Tr., 150:2-5 (J. Maldonado). Additionally, Abrahms invited everyone to tell Athens anything that had occurred so that it could be investigated. 150:6-8 (J. Maldonado). Jose Maldonado was also in attendance at a bargaining session the following day, May 31st, in which a similar discussion occurred. Tr., 150:9-23 (J. Maldonado).

Despite these bargaining sessions taking place only a few days after Jose Maldonado received his verbal notice for a no-call/no-show on May 22, Jose Maldonado did not bring up this issue regarding the no-call/no show. Tr., 150:24-151:1. Jose Maldonado could not provide an explanation why he did not bring forward this issue at that time. Tr., 151:2-6 (J. Maldonado). In fact, this allegation was not brought forward until after the decertification petition was filed. Tr., 151:7-19 (J. Maldonado).

Consequently, the credibility of Jose Maldonado's allegation is put into question by the fact that he did not bring up this allegation when he had the opportunity, and was only raised over a month later as part of an effort to block the pending decertification.

Accordingly, there is no basis for a finding of union animus in this case because Jose Maldonado has been involved with the Union for years and has suffered no adverse consequences, and Athens has not been seeking to discipline Jose Maldonado but rather has been lenient with its discipline. The single minor discipline he did receive was for a clear violation of policy, which he acknowledges, and yet he belatedly raised his uncredible claim in an effort to block the decertification petitions.

ii. Jose Maldonado's Testimony Regarding Eric Zufall is Not Credible and is Not Admissible.

The only attempt the General Counsel made to support animus was a hearsay statement testified to by Jose Maldonado himself. Jose Maldonado made multiple unbelievable and unsubstantiated claims regarding the decision to work the Saturday of the Company event rather than that Sunday. Most incredibly, he claimed that after the safety meeting in which Martorana discussed the Company event, supervisor Zufall walked up to him and a group of 10 to 12 shop employees and told them they had to work on Sunday, and then just walked away. Tr., 67:10-68:6 (J. Maldonado). Jose Maldonado testified that the employees were not happy about this so they went to Martorana, and he asked if they could work on Saturday instead. Tr., 68:10-69:1 (J. Maldonado). According to Jose Maldonado, Martorana was immediately receptive and simply responded that that was fine and it would not be a problem. Tr., 70:12-13, 130:5-24 (J. Maldonado).

Jose Maldonado also testified that about five minutes after he received his discipline for the no-call/no show, he told Zufall that he believed he received the discipline for speaking up for the guys regarding working on Saturday. Tr., 77:3-5 (J. Maldonado). Jose Maldonado unbelievably claimed that Zufall agreed with him and that Zufall stated that Jose Maldonado received the discipline for speaking up for the guys and the guys letting him down. Tr., 77:7-11 (J. Maldonado).[27]

Based on these alleged facts, Jose Maldonado testified that he believed he received the discipline for speaking up for the guys to be able to work on Saturday instead of Sunday. Tr., 78:2-4 (J. Maldonado). However, this statement is nonsensical and does not match up with the

[27] As noted, Jose Maldonado did not make any of these claims when given the opportunity on May 30 or 31, 2018, or at any time before the decertification petition was filed.

rest of his testimony let alone the record evidence. First, there were no allegations brought forth against Zufall prior to the Hearing when, for the first time, Jose Maldonado made this absurd statement that Zufall told him he was disciplined for standing up for his fellow employees. Second, Jose Maldonado testified that he could not even remember whether Martorana gave the employees the option to work Saturday or Sunday during the safety meeting. Tr., 67:5-9 (J. Maldonado). Nonetheless, it is clear that Martorana discussed the Company event at two separate safety meetings and that the employees voted to work Saturday at the second meeting. Er. Ex. 20; Er. Ex. 21; Tr., 1748:1-9 (Martorana). Lastly, even if this alleged request by Jose Maldonado did occur, Jose Maldonado testified that Martorana was completely receptive to the idea of the employees working on Saturday. Thus, as noted, there is no indication that Martorana was angry about this alleged request or that this created any animus for him.

Moreover, the alleged statement by Zufall regarding why Jose Maldonado was disciplined, is hearsay and cannot be relied upon to prove animus. Hearsay is defined as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c). Hearsay is not admissible. Fed. R. Evid. 802. The alleged statement by Zufall is clearly hearsay. Jose Maldonado testified about the statement, not the declarant (Zufall), and here it is offered to prove the truth of the matter asserted, *i.e.*, that Jose Maldonado was disciplined because he spoke up for the other Shop employees who wanted to work on Saturday and not Sunday. Thus, this statement is not admissible and cannot be considered.[28]

Furthermore, there are no available exceptions to the hearsay rule here. Specifically, the typical Opposing Party's Statement argument for a statement that is considered "not hearsay" does

[28] Notably, this hearsay statement is not only completely uncorroborated, but the only person who testified to it was a witness who was squarely discredited.

not apply to the context here. *See* Fed. R. Evid. 801(d)(2). "Admissions by a party-opponent are excluded from the category of hearsay on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule." Fed. R. Evid. 801(d)(2) advisory committee's note. Importantly, regarding the rationale for the admissibility of Opposing Party's Statements, "[t]he fact the party's statement was not made under oath or in the presence of the trier of fact is immaterial because the party is able to testify to the circumstances under which the statement was made." Hon. Robert E. Jones et al., Rutter Group Practice Guide: Federal Civil Trials and Evidence, ¶ 8:2027 (The Rutter Group 2019). Here, however, Zufall is not available and thus cannot testify about the circumstances in which this statement was made, if it was in fact made (which logically it was not).[29] Thus, the rationale for this exception to hearsay fails in this context. Moreover, the parties stipulated that no party would argue for an adverse inference for the fact that Zufall was not called as a witness. Tr., 1404:23-1405:6. Indeed, under prevailing precedent, no adverse inference can be drawn because Zufall is no longer with the Company. *See, Heart and Weight Institute,* 366 NLRB No. 53, slip op. at 1, n. 1 (2018); Tr., 1405:3-6 (Abrahms). Therefore, the Opposing Party's Statement argument is not available to the General Counsel in this context as Zufall is not available to testify and the General Counsel agreed that no adverse inference would be drawn from his unavailability. Accordingly, the alleged statement made by Zufall is hearsay and the General Counsel is left with no credible evidence regarding union animus.

iii. Countervailing Evidence Supports a Finding of No Animus.

Moreover, the testimony of Jose Maldonado and David Maldonado supports the conclusion that Martorana did not have any union animus. In fact, the testimony of Martorana, Jose

[29] As noted in the record, Zufall was unavailable because he has not been employed with Athens for over a year and he cannot be contacted. Tr., 1405:3-6.

Maldonado, and David Maldonado all agreed in certain respects regarding Jose Maldonado coming to talk to Martorana about the employees working on Saturday after the Company event. All three testified that Martorana quickly stated that the employees would be working on Saturday, not Sunday. 1752:3-8 (Martorana); 70:12-13, 137:19-23 (J. Maldonado); 337:23-338:3 (David Maldonado). Moreover, all three testified that Martorana was not in any way mad about Jose Maldonado coming into his office and asking about Saturday. Tr., 1752:12-18 (Martorana); 138:2-4, 143:14-17 (J. Maldonado); 338:9-13 (D. Maldonado). Additionally, on multiple occasions throughout his testimony, David Maldonado stated that he has "big respect" for Martorana, that Martorana is "really cool," and that "he's a nice guy." Tr., 338:4-13, 326:20-21, 317:21-23, 384:4-10 (D. Maldonado). Thus, there is absolutely no sign of animus regarding Jose Maldonado asking Martorana about the Saturday of the Company event.

Furthermore, Jose Maldonado has subsequently been promoted from a tire mechanic to an entry-level truck mechanic. Tr., 1760:18-24 (Martorana). The promotion resulted in a significant pay increase, from $17.00 an hour to $24.00 an hour. Tr., 153:19-154:4 (Martorana). The decision to promote Jose Maldonado was made by Martorana, who is the same person that Jose Maldonado brought both of his allegations against. Tr., 1760:25-1761:1 (Martorana). The promotion occurred after his conversation with Martorana regarding the Saturday Company event, after these allegations were brought against his manager, and long after he started participating in the bargaining committee. Tr., 154:5-18 (J. Maldonado). Martorana did not base either of his decisions, the discipline or the promotion, on Jose Maldonado's union or other activities. Tr., 1761:5-14 (Martorana).

The fact that Jose Maldonado was promoted by the same individual who disciplined him and who he brought these allegations against, alongside the fact that Martorana was in no way mad about Jose Maldonado asking him about the Saturday in question, shows that there is no animus.

Thus, Jose Maldonado was clearly disciplined for breaking Athens' Attendance Policy regarding no-call/no shows, and not for any union or protected activity. In fact, Jose Maldonado himself testified that there is no real evidence that the Company has any bias against him and he also testified that Athens treats him fairly. Tr., 154:18-24 (J. Maldonado).

iv. Even if it is Found that Athens' Reason for Disciplining Jose Maldonado is Pretextual, There Should Still be No Finding of Union Animus.

Even if it was found that the reason for disciplining Jose Maldonado, that he failed to show up for work Saturday, was pretextual, that does not necessarily mean there was union animus. In *Electrolux Home Products*, the Board noted that "[w]hen an employer has offered a pretextual reason for discharging or disciplining an alleged discriminatee, the real reason might be animus against union or protected concerted activities, but then again it might not." 368 NLRB No. 34, at 3 (2019).[30] In that case, the Board found that the employer's reason for discharging their employee, insubordination, was pretext because other insubordinate employees had received lessor forms of discipline than the alleged discriminatee. *Id.* The Board also noted that there was countervailing evidence to suggest that the employer did not have any animus. *Id*. Ultimately, since there was no basis to infer the employer discharged the employee for her union activities, other than the finding of pretext through disparate treatment, the Board held that there was no union animus toward the alleged discriminatee's union activities. *Id*. at 4, 6. Thus, the allegation

[30] In fact, in addressing the General Counsel's burden of proof under *Wright Line*, the Board pointed out that "where pretext alone furnishes the whole of the General Counsel's case, the possibility that something other than union activity motivated the discharge means that the General Counsel may have failed to sustain that burden." *Electrolux Home Products,* 368 NLRB at 4 n.11.

was dismissed as the General Counsel failed to establish by a preponderance of the evidence that the employer was unlawfully motivated in discharging the alleged discriminatee. *Id*. at 6.

Here, the facts regarding Jose Maldonado's discipline are much stronger for a finding of no union animus. First, here, there can be no finding of disparate treatment. All of the other employees that did not call into their supervisor at least an hour before the scheduled start time on May 19, 2018, and then failed to show up for work, also received discipline at the same level as Jose Maldonado. GC Ex. 2; GC Ex. 3; Er. Ex. 15. Athens has consistently applied its Attendance Policy regarding no-call/no-shows in the same manner as the discipline issued to Jose Maldonado for his no-call/no-show. In fact, there is absolutely zero evidence that suggests Jose Maldonado was treated disparately from any other employee, let alone in a manner which deviated from the policy or motivated by his protected activity. Moreover, like in *Electrolux Home Products*, there is also countervailing evidence to suggest that there is no union animus: the undisputed testimony showed that Martorana quickly said employees would work on Saturday after being questioned by Jose Maldonado, Martorana was not angry at Jose Maldonado for asking, Martorana was well liked by his employees, and Jose Maldonado was promoted. Consequently, here, in a situation where there is no disparate treatment to create an inference of pretext, and there is countervailing evidence supporting a finding of no animus, it is clear that there is no union animus. Thus, this allegation should be dismissed.

For the various reasons stated above, the General Counsel failed to meet its burden regarding union animus and thus this allegation should be dismissed.

c. <u>Jose Maldonado's Discipline was Completely Unrelated to his Protected Activity.</u>

The General Counsel failed to establish a nexus between Jose Maldonado's discipline and his protected activity. Thus, even if the General Counsel had established union animus, which it

did not, the allegation regarding Jose Maldonado's discipline should still be dismissed as "proving simple animus toward the union is not enough . . . . [T]he General Counsel must prove a connection or nexus between the animus and the [discipline], *i.e.*, that the discriminatory animus toward the employee's protected conduct was a substantial or motiving factor in the employer's decision to [discipline] him." *Tschiggfrie Props v. NLRB*, 896 F.3d 880, 886 (8th Cir. 2018) (internal citations and question marks omitted) (citing previous Fifth Circuit precedent quoting *NLRB v. Transportation Mgmt.*, 462 U.S. 393, 401 (1983)).

There is no nexus between Jose Maldonado's discipline and any alleged union animus as Jose Maldonado was disciplined in accordance with Athens' Attendance Policy and was given the lowest level of discipline possible. Athens Attendance Policy regarding a no-call/no-show states:

> If for any reason you cannot report for work at your scheduled start time, you must speak with your supervisor at least one (1) hour prior to your scheduled start time. If your supervisor is unavailable after a second attempt, provide a voice mail message stating reason for the absence and your contact telephone number.
>
> Failing to notify your supervisor of an absence prior to your start time may be considered a "No Call – No Show" and could lead to disciplinary action up to and including separation.

Jt. Ex. 58. It is undisputed that by default Jose Maldonado was scheduled for every Saturday and it was his obligation to inform management if he wanted a day off. It is equally undisputed that Martorana expected all hands on deck on May 19th.

Additionally, even if it was to be believed that Jose Maldonado had that Saturday off, even though Martorana explicitly told them that everyone needed to be at work that day, this does not change the fact that neither Jose Maldonado nor David Maldonado communicated to their superiors that they would not be at work on Saturday. Tr., 132:25 (J. Maldonado); 268:5-9, 269:21-22; 343:13-22; 344:7-9 (D. Maldonado). Consequently, Athens management had no way

of knowing that neither of the tire mechanics would be at work on May 19th, and thus they were both properly disciplined for a no-call/no-show.

Finally, there is no dispute that Jose Maldonado did not contact his supervisor prior to missing his scheduled shift on Saturday, May 19th, and was thus considered a "No Call – No Show." This is accurately reflected in Jose Maldonado's discipline received on May 21, 2018, which directly quotes from the policy listed above. GC Ex. 2. While the Attendance Policy allows for discipline "up to and including separation" for a no-call/no-show violation, Jose Maldonado was given the lowest level of discipline, a verbal warning. Tr., 147:21-23 (J. Maldonado); GC Ex. 2. Therefore, Jose Maldonado was disciplined for failing to show up to work and for failing to notify his superior of his absence ahead of time, not because of any alleged animus.

In fact, Jose Maldonado admitted that if Martorana expected him to be at work and he did not show up, then it would be considered a no-call/no-show. Tr., 147:14-20 (J. Maldonado). Again, Martorana testified, without contradiction, that he told the employees that it was all-hands on deck for that Saturday, and thus he expected all the employees, including Jose Maldonado and David Maldonado, to be there. Tr., 1749:16-1750:8 (Martorana). Therefore, Jose Maldonado was expected to be at work on Saturday, May 19, 2018, and when he did not show up or notify Athens that he would not be there, he was appropriately disciplined.

Thus, even by his own standards, Jose Maldonado was properly disciplined and the General Counsel has failed to show any kind of nexus between Jose Maldonado's discipline and any alleged Union animus.

Accordingly, the General Counsel did not meet its *Wright Line* burden as the General Counsel failed to prove by a preponderance of evidence that Jose Maldonado engaged in protected

activity, that there was union animus, and that there was a nexus between Jose Maldonado's discipline and any alleged animus. Therefore, this allegation should be dismissed.

d. Athens Clearly Would Have Disciplined Jose Maldonado for his No-Call/No-Show in the Absence of his Union or Protected Activity.

Even assuming the General Counsel met its burden of proving that Jose Maldonado's alleged protected activity was a motivating factor in the Athens' decision to discipline him, which it is not, this allegation must still be dismissed because clearly Athens would have disciplined Jose Maldonado for his no-call/no-show regardless of any union or protected activity. Under *Wright Line*, after the General Counsel has met its initial burden, the burden of persuasion shifts to the employer to demonstrate that it would have taken the same disciplinary action even in the absence of the employee's protected conduct. *United Rentals*, 350 NLRB at 951; *Electrolux Home Products*, 368 NLRB No. 34, at 3 (citations omitted).

As stated above, Martorana told all the Shop employees that they were required to work on Saturday, May 19th, the day of the Company event. Tr., 1749:16-1750:11 (Martorana). Nonetheless, both Jose Maldonado and David Maldonado failed to show up for work on May 19th. Tr., 1753:8-10 (Martorana). Thus, they were both properly disciplined. In fact, every employee who did not show up on May 19th and who did not call in received the exact same discipline that Jose Maldonado did.

Even if Jose Maldonado's testimony that he was not scheduled to work that Saturday was credible, which it is not, both Jose Maldonado and David Maldonado testified that it was up to them to figure out if one of them would take a Saturday off and that management expected at least one of them to be at work each Saturday. Tr., 115:22-116:5, 126:22-127:3 (J. Maldonado); Tr., 318:5-16, 252:23-253:11, 324:8-9 (D. Maldonado); 1743:2-5, 1799:15-16, 1801:11-15 (Martorana). Nonetheless, neither Jose Maldonado nor David Maldonado were at work that

Saturday and neither of them called their superior to let them know ahead of time. Tr., 1753:8-10 (Martorana), Tr., 132:25 (J. Maldonado); 268:5-9 (D. Maldonado). Consequently, there was no tire mechanic at the Pacoima Yard on May 19th, and they both were properly disciplined. Tr., 1759:15-17 (Martorana).

Moreover, it does not matter whether this expectation of management was reasonable or unreasonable as this is not a just cause analysis. All that matters is what has been shown: Jose Maldonado would have been disciplined for his no-show/no-call even in the absence of any union or protected activity, as he violated Athens' Attendance Policy. Tr., 1759:20-22 (Martorana). The employer has met its burden of persuasion and this allegation should be dismissed.

For the foregoing reasons, the allegation regarding Jose Maldonado's discipline at Paragraph 8 of the Complaint should be dismissed.

D. Athens Did Not Interfere With, Coerce or Restrain Employee Rights or Otherwise Violate the Act on July 12, 2018.

The Union and General Counsel allege that Athens violated Section 8(a)(1) of the Act by allegedly interfering with, coercing, or restraining employees in order to discourage employees from union activities, and by, on July 12, 2018, promulgating a rule and creating an impression of surveillance. These allegations are meritless and devoid of legal support.

1. Relevant Facts.

In July of 2018, Supervisor Eric Zufall came into Mark Martorana's office and told him that there was an altercation outside on the sidewalk under the Union's popup tent between certain individuals and Security Guard Q. Tr., 1764:11-19 (Martorana). The individuals were a mix of Athens' employees and Union representatives. Tr., 1767:21-1768:1 (Martorana). Zufall told Martorana that it was getting very heated and the individuals were calling Q a "nigger" and a "motherfucker." Tr., 1765:9-14 (Martorana); 1886:2-4 (Solis). Zufall stated that the individuals

were pushing Q really hard and that he was worried Q might "lose it." Tr., 1765:15-19 (Martorana).

Martorana decided to reach out to Solis about the ongoing incident. Tr., 1765:20-25 (Martorana). Solis had already left the facility for the day so Martorana called him on his cell phone. Tr., 1766:1-7 (Martorana); 1865:13-24 (Solis). Solis was driving home and was in the mountains near the Agua Dulce area when he received the call. Tr., 1865:25-10 (Solis). Martorana explained to Solis the situation and expressed his concerns. Tr., 1767:9-15 (Martorana); 1866:11-1867:5 (Solis). Solis asked Martorana if he knew who the employees were that were involved in the altercation but Martorana did not know who was involved. Tr., 1768:11-18 (Martorana); 1867:6-15 (Solis).

Although Solis is difficult to understand at times due to a heavy accent, Martorana believed that Solis told him to have Q tell the employees that they should not have their uniforms on while engaging with the Union on the sidewalk. Tr., 1769:1-5, 1768:19-21 (Martorana). Additionally, to have Q take photos of the employees so Solis would know which employees were involved. Tr., 1768:22-23 (Martorana). However, what Solis actually said was to have Q take a picture of the offending employees that have uniforms on for identification purposes, as the uniforms have the name of the employees, so that Solis would be able to talk to them about the altercation and potential unprotected, inappropriate conduct. Tr., 1867:16-21, 1868:15-18, 1886:13-18, 1888:17-23 (Solis). The supervisors and managers do not know all the employees' names but the uniforms have the employees' names on them. Tr., 1769:12-13 (Martorana).

This directive that Martorana believed he heard from Solis did not feel right to Martorana. Tr., 1770:1, 1807:3-6 (Martorana). Therefore Martorana asked Solis "are you sure that's what you want me to do?" Tr., 1769:20-22 (Martorana). Martorana did not repeat what "that" was. Tr.,

Tr., 1769:20-1770:4 (Martorana). Solis responded yes, but he did not repeat the order. Tr., 1770:5-6 (Martorana). Martorana then instructed Zufall to go inform Q about this misheard directive; namely to tell employees they could not wear their uniforms and to take their picture if they did. Tr., 1770:7-9 (Martorana).

A little later on, Martorana went out to the sidewalk to talk to the Union to make sure the situation was deescalating rather than escalating. Tr., 1770:12-15, 1811:3-8 (Martorana). Martorana provided the directive to the most vocal Union representative in order to try and diffuse the situation and keep the peace. Tr., 1770:22-1771:6, 1808:22-25 (Martorana). Martorana also stated that they did not want to get in the middle of this incident between employees because he did not want to put anything at risk with the LPA. Tr., 1831:14-22; GC Ex. 14(e).

The next day, Martorana went to the office of HR Manager Ramirez. Tr., 1771:19-1772:2 (Martorana); 1629:16-23 (Ramirez). Martorana explained the details of the incident from the previous night and how he had told the Union that employees should not be out there in their uniforms. Tr., 1772:2-8 (Martorana); 1629:5-14 (Ramirez). Ramirez responded in shock by saying "what the fuck." Tr., 1772: 9-12 (Martorana); Tr., 1630:9-11 (Ramirez). Ramirez told Martorana that he needed to fix the situation and Martorana responded that he would. Tr., 1772:19-25 (Martorana); 1630:17-25 (Ramirez). Ramirez has worked with Martorana for almost four years so when he told her that he would take care of it, she trusted that he would. Tr., 1717:13-18 (Ramirez).

Martorana then told Zufall that he needed to get in touch with Q and let him know that the employees are free to wear their uniforms while speaking to the Union. Tr., 1773:1-7 (Martorana). Zufall later reported back that he did speak to Q. Tr., 1773:13-17 (Martorana).

Martorana then went to talk to Solis. Tr., 1773:20-21 (Martorana). Martorana told him what had occurred and Solis was surprised and shocked to hear that Martorana had told the Union that employees should not be in their uniforms when talking to the Union. Tr., 1773:23-1774:2 (Martorana); 1889:7-14 (Solis). Solis told Martorana that that was not the instruction that he gave him. Tr., 1869:20-23, 1889:13-14 (Solis). Solis never intended for Martorana to tell employees that they could not talk to the Union while in their uniforms. Tr., 1870:18-20 (Solis). Solis' concern when hearing about this incident was that employees had started arguing and fighting with each other. Tr., 1871:2-9, 1887:7-9 (Solis).

Solis eventually received one picture from Q regarding this incident. Tr., 1870: 11-13 (Solis). Solis identified who the employee was then deleted the picture. Tr., 1870:14-15 (Solis). The employee in the picture was Jose Escobar. Tr., 1889:22-1890:3 (Solis). Solis talked to Escobar the next day about what happened. Tr., 1890:10-15 (Solis). Escobar confirmed that there was a back and forth argument and that there was name calling. Tr., 1890:12-14 (Solis). Escobar was not disciplined because Escobar stated that he was not involved in the name calling. Tr., 1890:15-20 (Solis). Solis never found out who had been calling Q names. Tr., 1890:21-23 (Solis).

The following week, when the Union returned with their popup tent, employees continued to talk with the Union while in their uniforms. Tr., 159:6-14 (J. Maldonado); 1774:5-11 (Martorana); 1632:5-12 (Ramirez); 1871:10-16 (Solis).

2. <u>Statements Made by Mark Martorana and "Q" Did Not Interfere With, Restrain, or Coerce Employees.</u>

The credible evidence shows that this entire situation was a mistake based on a misunderstanding and that no similar activity or statements were made prior to or after this singular day. In fact, the uncontradicted testimony shows that employees were permitted to and did in fact speak to Union representatives in their uniforms prior to, during, and after this day. Tr., 824:13-

17, 826:2-8 (Lopez); 86:15-21, 87:6-10, 170:1-2, 159:6-14 (J. Maldonado); 1774:5-11 (Martorana); 1632:5-12 (Ramirez); 1871:10-16 (Solis). The evidence shows that the employees and the Union did not take Q or Martorana seriously and did not believe they had the authority to make such a rule. GC Exs. 14(b)-(e); Tr., 170:5-17 (J. Maldonado). Jose Maldonado testified that Q was not wearing a uniform but rather regular clothes, that he has never been told that he needed to listen to Q, and that Q did not have the authority to tell him he could not wear his uniform while talking to the Union. Tr., 84:21-22, 167:15-25, 169:2-7, 170:5-17 (J. Maldonado).

The videos show that the employees and Union representatives were laughing, condescending, and did not take the statements regarding this "rule" seriously. GC Exs. 14(b)-(e); Tr., 169:23-25 (J. Maldonado). When Q first came out to speak with the Union, the Union representatives responded with "that is bullshit," "this is public property and they are off the clock," "tell him to go fuck himself," and "that we said, shut the fuck up." GC Ex. 14(b). The second time Q came outside, Jose Maldonado was there, and the individuals on the sidewalk said, "we are on public property," "these guys are on their break or off work," and "he is within his right." GC Ex. 14(c). The third time Q came out, Q told them he was just doing his job and the individuals responded with "you are not doing your [job]" and "this is public property." GC Ex. 14(d). Finally, when Martorana came outside and gave the misunderstood directive, the individuals responded "we don't care about your policy and your right," "this is public property," "can you control their life after [work]?", "what do they do when they drive home?", and "what time do they got to go to bed?" GC 14(e).

It is clear from the videos that at no point did the Union representatives or the Athens employees take either Q or Martorana seriously regarding whether employees could speak to the Union while wearing their uniforms. Moreover, no employees responded to the statements or

changed any of their activities. The employees did not change their uniforms and they did not stop talking to the Union. Tr., 170:1-4 (J. Maldonado); 53:1-2 (Garcia).[31] It is clear that the statements did not interfere with, restrain, or coerce employees in the exercise of their rights.

Martorana knew that violating the LPA could result in his termination, and yet, while aware that he was on video, he stated that he was the fleet manager and actually spelled out his full name. Tr., 1732:21-1733:2 (Martorana); GC Ex. 14(e). This is not the actions of an individual who is attempting to discourage employees from engaging in Union or other concerted activities, as the General Counsel has alleged in Paragraph 11(b) of the Complaint. Rather, this is an individual who made a mistake after mishearing a directive given to him by his manager, who has a thick accent, during a broken up cell phone conversation while dealing with an escalating situation.

As the evidence shows, Martorana and Q did not promulgate a rule prohibiting employees from speaking to the Union representative while wearing Company uniforms in response to its employees assisting the Union or engaging in other concerted activities, or to discourage employees from engaging in these activities. Rather a misunderstanding occurred after there had been a report that both Union and Athens employees had been swearing at and insulting Q. This is supported by video evidence in which the Union representatives use vulgar language when speaking to Q. GC 14(b). Moreover, these statements made by Martorana and Q did not interfere with, restrain, or coerce employees in the exercise of their rights. In fact, there was no credible

[31] As described above, Garcia's testimony regarding his interaction with Q on this date was not credible. Garcia made an absurd claim during his testimony that Q grabbed him but this was contradicted by video evidence and the testimony of a Union representative. Garcia made another claim that he did not continue talking to the Union representatives because Q had "already been pulling at me and I didn't know what the problem was and I don't want to get into any problems." Tr., 53:4-8 (Garcia). This is clearly false. First, as explained above, Garcia testified that he allegedly knew the problem was that he was talking to the Union while wearing his uniform, despite not being able to understand the language in which Q was speaking. Thus, Garcia clearly contradicts himself here. Second, as proven above, at no point did Q pull on Garcia or even get close enough to touch Garcia. The video clearly shows that Q barely passes by the gate, holds up his phone, and then retreats back into the Yard. GC Ex. 14(d). Once again, Garcia's testimony is contradicted by video evidence. Garcia's testimony is simply not credible.

evidence presented that the behavior of the employees changed in any way after this one-off incident. Accordingly, Paragraph 11(b) of the Complaint should be dismissed.

3. Q Did Not Create an Impression of Surveillance and Did Not Interfere With, Restrain, or Coerce Employees in the Exercise of Their Rights.

The credible evidence shows that Solis directed Q, through Martorana, to take photos of employees that were engaged in saying racial slurs and derogatory comments toward Q. Nonetheless, the directive was misunderstood by Martorana.

The Board applies an objective test to determine "whether an employer engages in unlawful surveillance or unlawfully creates the impression of surveillance," in which it evaluates "whether the employer's conduct, under the circumstances, was such as would tend to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed under Section 7 of the Act." *The Broadway*, 267 NLRB 385, 400 (1983) (citation omitted). Here, it is clear that the actions of Q did not interfere with, restrain, or coerce employee conduct. The evidence shows that the employees did not take Q seriously and did not believe he had any authority. The employees that were there during these interactions testified that they did not take off their uniforms or stop talking to the Union. Tr., 170:1-4 (J. Maldonado); 53:1-2 (Garcia). Moreover, in the subsequent weeks, employees continued to meet with the Union outside under the popup tent while wearing their work uniforms. Tr., 87:6-10, 159:6-14 (J. Maldonado); 1774:5-11 (Martorana); 1632:5-12 (Ramirez); 1871:10-16 (Solis). Jose Maldonado testified that since this day, he has spoken to the Union wearing his Athens uniform and it has never been an issue. Tr., 87:6-10 (J. Maldonado).

This was a one-off situation that only occurred because of a broken phone call in which a directive was misunderstood. In fact, many of the General Counsel's witnesses noted that the comments and actions of Q were out of place. Jose Maldonado stated that the comment was "weird" and "caught me off guard." Tr., 169:20 (J. Maldonado). Union Organizer Gilberto Lopez

stated that the comment by Q "surprised" him. Tr., 826:2-3 (Lopez). Under the circumstances, Q's conduct did not interfere with, restrain, or coerce employees in the exercise of their rights.

More specifically, when considering whether an employer has unlawfully created the impression of surveillance of employees' union activities regarding a statement, the Board considers "whether, under all the relevant circumstances, reasonable employees would assume from the statement in question that their union or other protected activities had been placed under surveillance." *Waste Management of Arizona, Inc.*, 345 NLRB 1339, 1339-1340 (2005); *Deep Distribs. of Greater N.Y. dba Imperial Sales, Inc.*, 365 NLRB No. 95, at 15 (2017) (quoting *Grouse Mountain Lodge*, 333 NLRB 1322, 1322 (2001)). As former Chairman Miscimarra stated: "When union activity is conducted openly, it is unreasonable to conclude that statements indicating that the activity has been observed create an impression of surveillance." *Deep Distribs. of Greater N.Y. dba Imperial Sales, Inc.*, 365 NLRB at 1 n.4 (Chairman Miscimarra dissenting regarding the impression of surveillance allegation).

In *Michigan Road Maintenance Company, LLC*, the Board held that the General Counsel failed to establish an impression of surveillance, when the Operations Manager told an employee, who had just finished placing union flyers on cars parked in the employer's parking lot, not to "start that union stuff on this property." 344 NLRB 617, 617 n.4 (2005). The Board noted that "the union activity was in the open, and thus there was no reason for [the employee] to believe that [the Operations Manager] acquired his knowledge by spying on the activity." *Id.* This is directly comparable to the situation at hand. As the Union repeated many times on video, these interactions took place on public property, on the sidewalk adjacent to the yard, out in the open. Thus, there is no reason for any of the employees to believe that they are being spied on by Q or management.

Thus, similar to *Michigan Road*, the General Counsel failed to establish an impression of surveillance here.

Correspondingly, in applying the test in *Waste Management of Arizona, Inc*., the Board held that the employer did not create an impression of surveillance when a manager stated to an employee that "he was aware that the employees had held a union meeting." 345 NLRB at 1339-1340. The Board noted that there was no evidence presented to show that the meeting was in secret and thus the managers "statement that he knew that employees had held a union meeting would not have reasonably implied that [the manager] had monitored employees' activities, given the various other ways in which [the manager] might have learned of the nonsecret meeting." *Id.* at 1340. Similarly here, the Union's activities were not held in secret and were completely visible from the Yard. There would be no reason for Athens to "monitor" the Union in this situation as anyone walking in the vicinity of the Union's popup tent could easily see that Athens employees were wearing their uniforms while talking to the Union. Thus, Q's statements that employees cannot wear uniforms while speaking to the Union, although misguided, does not create an impression of surveillance.

The statement and actions by Q are simply a misunderstood directive that employees cannot be in their uniforms while speaking to the Union. It would be illogical and unreasonable for any employee in this context to believe that their union or other activities had been placed under surveillance simply because Q made a statement, which no one believed he had the authority to make, regarding employees wearing their uniforms while talking to the Union. Even a person from a great distance away from the Union popup tent could see that an employee was wearing their uniform (some in bright vests) while talking to the Union. This does not indicate any sort of monitoring or surveillance. If such a situation was considered "surveillance," then the employer

would be required to wear blinders at all times so that they could not see their employees talking to the Union. As the Board has consistently held "an employer's mere observation of open public union activity on or near its property does not constitute unlawful surveillance." *National Steel & Shipbuilding Co.*, 324 NLRB 499 (1997) (citing *F.W. Woolworth Co.*, 310 NLRB 1197 (1993)).

Accordingly, Q's statement to employees did not create an impression that management was watching employees' union activities and Paragraph 10(a) of the Complaint should be dismissed.

In regards to the photo taken by Q, the Board has held that "photographing or videotaping employees engaged in protected activity violates the Act unless the employer can demonstrate that it had a reasonable basis to have anticipated misconduct by the employees." *CL Frank Management, LLC*, 358 NLRB 954, 962 (2012) (citing *National Steel & Shipbuilding Co.*, 324 NLRB 499 (1997)). Here, Athens had a reasonable basis to have anticipated misconduct by the employees. The only reason that Q went out to speak with and possibly take photos of employees was because of the report that Union representatives and Athens' employees had been saying derogatory terms to Q such as "nigger" and "motherfucker." Consequently, Athens not only had a reasonable basis to anticipate further misconduct but also had a reasonable basis to believe that misconduct had already occurred and was ongoing.

Moreover, in considering this issue, "[t]he inquiry is whether the photographing or videotaping has a reasonable tendency to interfere with protected activity under the circumstances in each case." *National Steel & Shipbuilding Co.*, 324 NLRB at 499. As has been stated *ad nauseum*, the photographing did not interfere with protected activity under the circumstances of this case. Q's actions on this singular day did not interfere with protected activity on that day or subsequent days. The testimony provided by the General Counsel's own witnesses proved that

the employees continued to wear their uniforms and speak to the Union during this interaction and after.

Athens had a reasonable basis to have anticipated misconduct by its employees and Q's photographing of Athens employees did not interfere with, restrain, or coerce the employees' protected activity under the circumstances. Accordingly, Paragraph 10(b) of the Complaint should be dismissed.

E. Athens Did Not Unlawfully Surveil Employees During the Union's August 2, 2018 Trespass.

The Union and General Counsel allege Athens violated Section 8(a)(1) by surveilling employees engaged in union activity in the Pacoima Yard Training Room while the Union representatives were trespassing. This allegation is clearly without merit.

1. Relevant Facts.

The Pacoima Yard closed at approximately 6:15 PM on August 2, 2018. Er. Ex. 22. Almost all trucks were back in the Yard so Martorana directed the gates be closed. Tr., 1774:20-23 (Martorana). Martorana told Q to get the gates closed and make sure the Union was off the property. Tr., 1775:4-9 (Martorana). The Union had been on the property that day so Martorana told Q to let them know we are closed now and it's time to exit the property. Tr., 1775:9-12 (Martorana).

However, Q reported back to Martorana that he went to close a different gate and a few of the Union representatives entered in through that gate before he could close it. Tr., 1775:13-18 (Martorana). Martorana asked Q where the Union representatives were and he responded that he did not know as they disappeared and were hiding between the rows of trucks. Tr., 1775:23-25, 1815:19-25, 1816:6-11 (Martorana). These are large trucks that are about seventeen feet tall and

eight feet wide, with only about three feet between them when parked in the Yard. Tr., 1833:19-1834:6 (Martorana).

A few minutes later, a number of Union representatives approached Martorana in the Yard. Tr., 1775:25-1776:2 (Martorana); Er. Ex. 23. Also included in this group was an employee for a competitor of Athens, Republic Services. Tr., 783:23-784:4 (Hernandez). This individual was wearing the uniform of Republic Services. Tr., 741:17-21, 763:16-19 (Acosta).

Martorana asked the Union representatives and the Republic Services' employee if he could help them. Er. Ex. 23. At this point in the day, the Union representatives had already been told that their access to the Yard was over for that day. Tr., 1787:25-1788:1 (Martorana).[32] A Union representative then claimed that they still had access but Martorana immediately stated that they did not have access and he had been told to get them off the property. Er. Ex. 23. The Union representative then claimed that "Tomas" (Solis) told them they could be there. Er. Ex. 23. The Union members continued to walk toward the building despite the fact that Martorana had told them they did not have access to the property. Er. Ex. 23. Martorana warned the Union representatives that he would call the police if they entered the building. Er. Ex. 23; Tr., 785:8-9 (Hernandez). Undeterred, the Union representatives continued to walk into the building and two of them stated "call them now then." Er. Ex. 23.

The Union representatives entered into the building and walked through a hallway back to the break room. Er. Ex. 23. Martorana told the Union representatives that the mechanics were not on lunch so they could not talk to the Union representatives. Er. Ex. 23. Martorana reminded the Union representatives that they are only allowed in the common area. Er. Ex. 23. At this point, Martorana did not know where the Union representatives were headed as they could have still gone

[32] Moreover, previously in the day the Union had twice been informed that the Republic Services employee was not authorized to be on the property. Tr., 1634:14-19, 1635:24-1636:22 (Ramirez).

into the Shop. Tr., 1791:1-8, 1820:9-16 (Martorana). The Union representatives passed by the Break Room area, which contained multiple empty tables. Er. Ex. 23; tr., 17921:9-12 (Martorana). However, still undeterred despite Martorana's many warnings, the Union representatives began to enter into the Training Room, which is a work area. Er. Ex. 23; Tr., 1822:5-10 (Martorana). Martorana told them that the Training Room is not a common area, but the Break Room is. Er. Ex. 23.

Martorana entered into the Training Room after the Union representatives. Er. Ex. 23; Tr., 89:11-12 (J. Maldonado). Martorana was surprised to see employees eating in the Training Room as it is not a lunch room and he has never seen employees eat their lunch in there before. Tr., 1780:15-24, 1825:3-13 (Martorana). Martorana asked the employees in the Training Room what time they clocked out for lunch. Er. Ex. 23. Martorana knew, based on the time, that the mechanics should have already been off lunch or close to it. Tr., 1790:23-25 (Martorana). Not all of the employees responded but many did and the ones that did claimed either 6:30 PM or 6:35 PM, and confirmed that they were off the clock. Er. Ex. 23; Tr., 362:15-363:6, 373:20-374:2 (D. Maldonado).[33] One of the Union representatives said, "6:30, so you guys are in lunch, right?" Er. Ex. 23. Martorana was on his cell phone and asked "Tomas, what do you want me to do?" Er. Ex. 23. Martorana began to exit the Training Room and one of the Union representatives stated: "go fuck yourself." Er. Ex. 23. Martorana did not respond to this demeaning comment but continued to exit the room. Er. Ex. 23. Martorana has heard that type of language being used by the Union representatives toward the Employer on other occasions. Tr., 1792:1-5 (Martorana).

[33] However, some of the employees had lied. At least four of the employees that were in the room had already taken their lunch break and were clocked back in for work, including Jose Maldonado and David Maldonado. Er. Ex. 22; Er. Ex. 18.

Notably, however, Martorana has never heard an Athens' supervisor use such language toward the Union. Tr. 1792:6-14 (Martorana).

After Martorana left, he did not tell Q to go into the room or take pictures or videos. Tr., 1830:5-9 (Martorana). Nonetheless, Q went into the Training Room. Tr., 90:22-25 (J. Maldonado). Q pulled out his phone and appeared to take pictures or a video. Tr., 189:3-8 (J. Maldonado). Q was holding his phone toward the Union representatives, not the Athens employees. Tr., 752:9-11 (Acosta), 356:24-357:2 (D. Maldonado); 798:6-8 (Hernandez). Then Q walked out of the Training Room. Tr., 91:22-23 (J. Maldonado). Richard Gonzalez later entered into the Training Room and ate some pizza. Tr., 92:1-2 (J. Maldonado). He sat away from the other employees. Tr., 194:1-8, 195:4-6 (J. Maldonado). Gonzalez did not say anything to anyone. Tr., 92:9-10 (J. Maldonado). In fact, an Athens' employee told the Union representatives "that it's okay for him to stay there, because anyway, he doesn't speak Spanish and we can talk in Spanish." Tr., 754:20-22 (Acosta). Gonzalez stayed in the Training Room after the Union representatives and other employees left, continuing to eat his lunch. Tr., 789:21-22 (Hernandez).

The General Counsel admitted on the record that Gonzalez and Q were not supervisors and they did not maintain supervisory status. Tr., 1403:8-23.

After Martorana left the room, he spoke with other individuals from Athens' management about the situation. He received a call from Michael Pompay, Athens' Vice-President of HR, who, as an accommodation, told him to tell the Union that they could stay until 7:00 PM but if they did not leave at that point then Athens would call the police. Tr., 1781:24-1725:23. Thus, Martorana went back in to the Training Room to let the Union representatives know that they could stay until 7:00 PM but then they needed to leave. Tr., 1782:24-25, 1784:15-17 (Martorana).

That same night, Martorana went to his office and decided to check if the Shop employees were really on their lunch breaks from 6:30 to 7:00 as claimed. Tr., 1783:4-14 (Martorana). Martorana discovered that a number of the employees who had stated that they had clocked out at 6:30 PM were lying. This included Jose Maldonado and David Maldonado. Tr., 1783:15-1784:5 (Martorana); Er. Ex. 22. Despite the fact that these employees had taken an unauthorized break, Athens did not discipline these employees for this infraction. Tr., 1786:11-18 (Martorana).

2. Q Was Not Acting as an Agent.

Q was not acting as an Athens' agent when he entered the Training Room and held up his phone as if he was video recording the Union representatives. It is the burden of the party who asserts that an individual has acted with authority to establish agency. *Pan-Oston Co.*, 336 NLRB 305, 306 (2001); *Comau, Inc.*, 358 NLRB 593, 595 (2012). There was no evidence presented to show that any manager instructed Q to record the Union representatives. Rather, Martorana's unrefuted testimony was that he did not tell Q to go back into the Training Room and record the Union representatives. Tr., 1830:5-9 (Martorana). Thus, there is no credible evidence presented to prove that Q had actual authority to surveil or video record the Union's employees.

Q also did not have apparent authority. In determining whether an employee is acting with apparent authority on behalf of the employer when that employee takes a particular action, the Board applies the common law principles of agency. *Pan-Oston Co.*, 336 NLRB at 305 (citing *Cooper Industries*, 328 NLRB 145 (1999); *Hausner Hard Chrome of KY, Inc.*, 326 NLRB 426, 428 (1998)).

> Apparent authority results from a manifestation by the principal to a third party that creates a reasonable belief that the principal has authorized the alleged agent to perform the acts in question. Either the principal must intend to cause the third person to believe the agent is authorized to act for him, or the principle should realize that its conduct is likely to create such a belief. [¶]]. The Board's test for determining whether an employee is an agent of the employer is

> whether, under all of the circumstances, employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management.

Pan-Oston Co., 336 NLRB at 305-06 (internal citations omitted). The Board has "emphasize[d] that an employee may be an agent of the employer for one purpose but not another." *Id.* at 306.

There was no evidence put forth to show that Athens had any policy to surveil or record Union representatives holding a meeting with Athens employees. Therefore, no employee could reasonably believe that Q was reflecting Company policy by entering into the Training Room and holding up his phone.

Additionally, considering all the circumstances at hand, an employee could not reasonably believe that Q was acting for management. Martorana was present for the entirety of the trespassing incident up until he decided to leave the Training Room of his own volition and not respond to the Union representative telling him to "go fuck himself." Martorana had already observed the Union representatives and the employee from Republic Services walk through the Yard, into the building, and into the Training Room. Martorana followed them into the Training Room and then upon seeing the employees in the room, took the time to specifically ask them if they were off the clock. Martorana stayed in the Training Room a bit longer before exiting. There would be no reason for Martorana to send Q back into a room, that he had just left, to surveil the employees. Martorana already knew who was present in the room and what the circumstances were. There was no new information regarding employee protected activity that he could have obtained by sending Q into the Training Room. Thus, it would be unreasonable for any of the employees to believe that Q was acting for management.

Moreover, Martorana had his phone in his hand the entire time. As can be seen in the video, he was talking on speaker phone, which means if he had wanted to take a photo or a video

of the incident then he could have done so with his phone. There would be no reason for him to send Q back in to do what he could have already done.

Lastly, even if employees thought Martorana sent Q in, they would not have thought he was sent in to surveil employees' activities. Rather, everything about the incident and Q's behavior would have, at worst, indicated he was merely documenting the Union representatives and their unlawful trespass.

Accordingly, under all of the circumstances, it would be unreasonable for an employee to believe that Q was surveilling employees for management in this scenario. The General Counsel has failed to meets it burden of establishing agency.

3. Even if Q was an Agent, Athens Had a Right to Observe and Video Record the Union Representatives Because They Were Trespassing onto Athens Property.

Even if it is held that Q is an agent of Athens and that Q was recording,[34] this allegation should still be dismissed as "[t]he Board has also recognized that the taking of pictures or videotaping to document trespassory activity for the purpose of making out a trespass claim is an acceptable justification." *Corporate Interiors, Inc.*, 340 NLRB 732, 746 (2003) (citation omitted); *Ordman's Park & Shop*, 292 NLRB 953, 956 (1989) (employer did not engage in unlawful surveillance "in which there was no photographing of any of the Respondents' employees, but only of nonemployee, paid pickets whose message was aimed at consumers and not at the Respondents' employees, and in which photographs were taken in order to secure evidence of alleged trespassory activities and without any evidence of coercion of the Respondents' employees."); *Berton Kirshner, Inc.*, 209 NLRB 1081 (1974) (no unlawful surveillance when respondent called police regarding trespass and took several photos of union representatives

[34] This allegation should be dismissed quickly as there is no evidence that Q actually recorded anything with his cell phone. In fact, Rey David Acosta, a Union Business Agent who was one of the trespassing individuals, testified that Q was "pretending that he was recording." Tr., 751:13 (Acosta).

handbilling to employees as they left the premises, but did not photograph subsequent handbilling of employees by union representatives.).

Q, if he was actually recording, was only recording the Union representatives, not Athens' employees engaged in union or protected activity. Tr., 752:9-11 (Acosta), 356:24-357:2 (D. Maldonado); 798:6-8 (Hernandez). Union representative Acosta was directly asked during the Hearing if Q was pointing the phone at the employees in the room, Acosta responded "No. It was to us - - towards us." Tr., 752:9-11 (Acosta). The Union itself admits that Q was not recording the Athens employees but rather the trespassing representatives.

There can be no doubt that the Union was trespassing in this case. Former Union representative Fernando Hernandez, one of the trespassers, stated that they saw the security guard lock the gate and then the security guard would not let them in, so they decided to go through a different exit. Tr., 782:20-24 (Hernandez). Moreover, Acosta testified that when they entered through the other gate the security guard told them they were trespassing but they just kept walking. Tr., 747:13-25 (Acosta). Acosta admitted that the security did not want them to walk onto the property at that time. Tr., 771:8-12 (Acosta). Hernandez admitted during testimony that Martorana told them they were trespassing and asked them to leave. Tr., 795:11-15 (Hernandez). Moreover, Hernandez admitted that Martorana disputed that they had permission to be there and that Martorana never said it was okay for them to be there. Tr., 795:19-25 (Hernandez). The video also clearly shows that Martorana told them they were not allowed on the property and that he would call the police if they did not leave. Er. Ex. 23. Athens made it crystal clear that they believed the Union representatives were trespassing. Consequently, Q would have been justified in recording the Union representatives.

It is likely, despite the testimony to the contrary, that the General Counsel will argue that Q was videotaping the employees. This is not only illogical, but actually does not impact the analysis here, as "[t]he Board has held that where photographs are taken for the purpose of gathering evidence, and there is no showing of coercion of the employees, such photographing is not unlawful." *Ordman's Park & Shop*, 292 NLRB 953, 956 (1989) (citing *Roadway Express*, 271 NLRB 1238 (1984)). Here, if it is to be believed that Q was an agent of Athens and that Q was actually recording employees, the recording was only done to capture the trespassing of Union representatives as evidence and thus there was no coercion of the employees. All of the employees witnessed the unique event of the Union representatives barging into the Training Room and a loud argument occurring between Martorana and the Union representatives. This is not a situation where the employees were meeting with Union representatives and then an agent of Athens came in to surreptitiously record creating an atmosphere of coercion. Rather, when looking at the circumstances as a whole, this was a unique scenario and there is no evidence of employee coercion here.

Thus, this allegation against Q should be dismissed for a multitude of reasons: Q was not an agent of Athens, there is no credible evidence that Q was recording, Q was not recording employees, and Athens would have been justified in recording the Union representatives as they were trespassing.

Ultimately, this is the situation of a child being caught hitting their sibling and then claiming that their sibling hit them in order to get out of trouble. The Union was illegally trespassing and have now attempted to convolute the situation to blame Athens for their own wrongdoing.

For the reasons expressed above, the allegations regarding Q in Paragraph 12 of the Complaint should be dismissed.

4. <u>It Was Not Unlawful for Richard Gonzalez to Eat Lunch in the Training Room.</u>

Richard Gonzalez did not have actual or apparent authority to surveil employees on August 2, 2018. As stated above, in considering whether an employee is an agent of the employer the Board considers all of the circumstances to determine if "employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management." *Pan-Oston Co.*, 336 NLRB at 306 (citation omitted). The burden here is on the General Counsel to prove agency. *Id.* at 306. There was no evidence presented by the General Counsel to show that Gonzalez had actual authority to surveil employees' union activities. None of the General Counsel's witnesses testified that they believed Gonzalez was spying on their union activities. Moreover, the only evidence presented by the General Counsel to establish that Gonzalez had apparent authority was testimony that he was in Martorana's office frequently, about one hour a day, and that Jose Maldonado and David Maldonado had not seen him eat in the Training Room before. Tr. 293:6-10, 295:25-296:1 (D. Maldonado); 92:13-18 (J. Maldonado). This is not sufficient evidence to prove that a non-supervisory employee had apparent authority to surveil employees' union activities. This is especially so when the only evidence about that day was he took the opportunity to eat some free pizza.

The Board has also "emphasize[d] that an employee may be an agent of the employer for one purpose but not another." *Pan-Oston Co.*, 336 NLRB at 306. Thus, the alleged fact that Gonzalez is frequently in Martorana's office does not mean that he had apparent authority in this situation. Moreover, it is illogical to think that Martorana would have sent in a non-Spanish speaker to surveil a meeting being held in Spanish. Tr., 754:20-22 (Acosta). As the evidence

shows, Gonzalez did not speak to anyone but simply sat down to eat lunch and then stayed in the Training Room to continue eating after the Union representatives and the other Athens' employees left.

Under all of the circumstances, Athens' employees could not reasonably believe that Gonzalez was acting for management in this situation. The General Counsel failed to meet their burden.

5. Richard Gonzalez was not acting as Athens' agent when he ate his lunch in the Training Room on August 2, 2018.

Even if Gonzalez was acting as Athens' agent, he did not violate the Act when he ate lunch in the Training Room. The Board has held "that 'management officials may observe public union activity, particularly where such activity occurs on company premises, without violating Section 8(a)(1) of the Act, unless such officials do something out of the ordinary.'" *UPMC*, 368 NLRB No. 2, at 8 (2019) (quoting *Metal Industries Inc.*, 251 NLRB 1523 (1980)).

Multiple employees were eating in the Training Room that day. This room, according to the General Counsel's discredited theory, was a regular lunch room, which would then have no expectation of privacy. In fact, Jose Maldonado testified that he did not have any expectation that the Training Room was a private room. Tr., 234:20-23 (J. Maldonado). According to Jose Maldonado, this was not a private meeting room but a room that anyone could use. Tr., 234:4-19 (J. Maldonado). Gonzalez did not do anything out of the ordinary but was using the Training Room in the same manner that all the other employees were that day, eating lunch. As stipulated by the General Counsel, Gonzalez was not a supervisor, and thus was just another employee eating in the Training Room (albeit against the rules). As a matter of fact, Gonzalez did exactly what David Maldonado did, he grabbed some Company provided pizza from the Break Room and brought it into the Training Room to eat. Tr., 275:22-24, 278:17-20 (D. Maldonado). The only

difference is that Gonzalez did not sit by the other employees but opted to eat alone. Tr., 194:1-8 (J. Maldonado).

Even if Gonzalez was considered an agent of Athens in this specific situation, he did not do anything out of the ordinary when he observed the other employees eating lunch while he did the exact same thing.

Accordingly, the allegations against Gonzalez in Paragraph 12 of the Complaint should be dismissed.

F. Athens Did Not Unlawfully Refuse to Bargain Regarding Use of the Training Room.

The Union and General Counsel allege Athens violated Section 8(a)(5) by allegedly unilaterally changing the use of the Pacoima Yard Training Room to prohibit its use as a lunch room. This allegation is devoid of factual or legal support.[35]

1. Relevant Facts.

a. Various Areas for Employees to Eat within the Pacoima Yard.

The Pacoima Yard has multiple areas where employees are welcome to eat lunch. Tr., 1835:10-13 (Martorana). One such area is the Break Room. Tr., 1649:3-7 (Ramirez); Er. Ex. 4. The intended purpose of the Break Room is for the employees to be able to take their breaks or lunches. Tr., 1649:8-10. The Break Room, also referred to as the "Athens 7/11," contains a full-sized refrigerator for employees to store their lunches, an ice machine and water dispenser, a coffee stand, a microwave with a bright yellow warning sign above it, multiple food and drink items for

[35] The General Counsel also claims that the allegations listed in paragraph 15 of the Complaint, regarding the alleged closing of the Training Room, also make up an 8(a)(3) violation. Complaint, ¶ 18. However, there was absolutely no evidence brought forward to support such an allegation and this allegation does not meet the standard of an 8(a)(3) violation. There has been zero evidence of any employee being treated differently in regards to the Training Room. On the contrary, the evidence shows that no employees can take their breaks or lunches in the Training Room. Moreover, even if the Training Room was closed in response to the August 2, 2018 incident, which it was not, the incident did not involve protected activity as trespassing and unauthorized breaks are not protected activities under the Act.

purchase, and numerous tables and chairs. Er. Ex. 4; Tr., 1653:2-12, 1654:19-1655:12 (Ramirez); 1789:6-17 (Martorana); 210:25-211:7 (J. Maldonado). This area is not considered a work area. Tr., 1655:22-24 (Ramirez).

There is also a Kitchen. Tr., 1649:12-15 (Ramirez). The Kitchen has a refrigerator, a microwave, a coffee stand, and some tables and chairs. Tr., 1649:12-24 (Ramirez). This room is located less than a minute away from the Break Room and allows for about twelve people to sit and eat their lunch. Tr., 1649:25-1650:6 (Ramirez). All of the employees, including the Shop employees, are allowed to use the Kitchen. Tr., 1650:7-10 (Ramirez); 1835:9-22 (Martorana). There is also an additional area in the Shop where employees can take their breaks or meal periods. 1651:1-16 (Ramirez). This area also contains a microwave, portable stand-up heaters, a fridge, and tables and chairs. Tr., 1651:17-25 (Ramirez). This area seats about fifteen people. Tr., 1652:2-3 (Ramirez).

b. <u>The Training Room.</u>

The Pacoima Yard also has a Training Room, which is specifically for safety training for drivers and Shop employees, leadership training for supervisors, and various other work-related meetings. Tr., 1656:4-11 (Ramirez). Athens has never authorized employees to take their breaks or lunches in the Training Room. Tr., 1657:10:12 (Ramirez). Rather, the Training Room is considered a working area because all of the activities that occur in that room are work-related. Tr., 1656:17-22 (Ramirez); 1792:15-1793:1 (Martorana).

If someone is passing by the Training Room they cannot see inside the room. Tr., 1710:7-21 (Ramirez). In the four years of her employment the only time Ramirez specifically recalls seeing employees eating in the Training Room is at the end of a day when she went into the Training Room to set up for an early morning training the next day. Tr., 1718:24-1719:10 (Ramirez). She was surprised to see employees in there. Tr., 1710:19-21, 1719:11-14 (Ramirez).

She let Martorana know that she had seen employees eating in the Training Room and that he needed to counsel them that it was not a break area. Tr., 1711:1-4 (Ramirez). Ramirez does not normally counsel or discipline employees without dealing with their supervisors or managers first. Tr., 1719:16-18 (Ramirez). Rather, as she did here, when she sees an employee breaking a rule she will let their manager know so that the manager can address it. Tr., 1719:21-25 (Ramirez); 1793:15-24 (Martorana).

Upon Ramirez telling Martorana that she saw his Shop employees eating lunch in the Training Room, Martorana reminded the Shop employees during a safety meeting that they are not supposed to take their lunch breaks in the Training Room. Tr., 1794:7-1795:23 (Martorana). In one such safety meeting, in March of 2018, Martorana specifically reminded his employees that they are not supposed to be eating lunch in the Training Room. Er. Ex. 24; Tr., 1795:17-23 (Martorana). Jose Maldonado and David Maldonado were in attendance. Er. Ex. 24; Tr., 1795:24-1796:11 (Martorana). Martorana has reminded employees about this rule on various other occasions as well. Tr., 1827:19-23 (Martorana). Martorana also manages the housekeeper and at times she has let him know that she found food and trash in the Training Room. Tr., 1827:24-1828:15 (Martorana). Thus, after such times, Martorana has reminded his employees not to take their lunches in the Training Room.

2. <u>Athens' Employees have Never Been Allowed to Eat Their Lunch or Take Their Breaks in the Training Room.</u>

The rule and policy maintained at Athens has always been that employees are not allowed to eat their lunch or to take their breaks in the Training Room; rather, the Training Room has always been used for work-related purposes. "The Board has historically required that the change complained of must be of an activity [sic] which has been 'satisfactorily established' by practice or custom; an 'established practice'; and 'established condition of employment.'" *Exxon Shipping*

Co., 291 NLRB 489, 493 (1988) (citing *Granite City Steel Co.*, 167 NLRB 310, 315 (1967); *Chef's Pantry*, 274 NLRB 775 (1967); and also *Gulf States*, 61 NLRB 852, 862(1982)). The alleged "change" here, that employees are no longer allowed to eat their lunches in the Training Room, is not a practice that has been satisfactorily established. "When alleging a unilateral change from an established past practice or understanding, the General Counsel has the burden of demonstrating the existence of the past practice or understanding." *Pan American Grain Co.*, 343 NLRB 318, 331 (2004) (parenthetical citing *Exxon Shipping Co.*, 291 NLRB 489, 493 (1988)). The General Counsel has failed to meet its burden.

Employees have never been allowed to use the Training Room as a lunch room. When Ramirez walked in on employees eating lunch in the Training Room, she notified Martorana who then reminded the employees at the next safety meeting that they were not allowed to eat in the Training Room. Er. Ex. 24; Tr., 1709:25-1711:2, 1719:11-1720:11 (Ramirez). It should be noted that the only reason Ramirez did not say anything to the employees is that it is not her practice to correct or discipline employees without speaking to their managers first. *Id.*

Additionally, on the occasions when Martorana was notified by housekeeping that food and trash were found in the Training Room, Martorana reminded the employees that they are not allowed to take their lunches in the Training Room. Tr., 1827:19-1828:15 (Martorana). Importantly, "[e]nforcement of an existing rule does not constitute a unilateral change simply because enforcement was somewhat lax or inattentive in the past." *Pan American Grain Co.*, 343 NLRB 318, 331 n.34 (2004) (citing *Rust Craft Broadcasting of New York*, 225 NLRB 327 (1976)). Thus, it makes no difference that employees would have needed to be reminded that they are not allowed to eat their meals in the Training Room, that the rule may have not be perfectly enforced, or that the door to the Training Room may have been unlocked at times. Moreover, the evidence

shows, if employees did in fact take their lunches in the Training Room, that management did not know employees were eating in the Training Room. Tr., 1825:3-13 (Martorana); 1709:25-1710:7, 1720:9-11 (Ramirez). Ramirez admits that she may have seen employees eating their lunch in the Training Room once or twice in four years, but it surprised her and she reported the incident to the employees' manager to deal with the situation. Tr., 1710:19-21, 1719:11-14, 1711:1-2 (Ramirez).

Athens admits that at times employees have eaten in the Training Room when food is brought in by management during trainings for special occasions like birthdays. Tr., 1825:11-13, 1826:21-1827:2 (Martorana). The simple fact that Athens chooses to go above and beyond to celebrate its employees during work meetings does not change the fact that Athens' policy is that employees cannot take their breaks or lunches in the Training Room.

Lastly, when comparing the Break Room and the Training Room, it is clear that the Break Room is meant for breaks and eating, while the Training Room is meant for work-related activities. The Break Room has multiple food and drink options available for purchase, a water and ice machine, a refrigerator for storing food, a coffee machine, circular tables allowing employees to eat lunch while facing their co-workers, and chairs. Er. Ex. 4. The Training Room on the other hand is set up a like a classroom, it has rectangular tables with chairs all facing toward the front of the classroom, a television, a whiteboard, and an easel. Er. Ex. 3. Admittedly, the Training Room has a coffee machine and sink, but that does not mean it is meant to be an area to eat or drink, but this simply allows for employees to have coffee during meetings and a way to clean up any spills or empty mugs. Er. Ex. 3. Therefore, based on the set up of the rooms alone, it is clear that the Training Room is intended to be a place of work, whereas the Break Room is meant for people to take a break and eat lunch. Er. Ex. 3; Er. Ex. 4.

The General Counsel may argue that simply because a microwave was in the Training Room at some point means that employees were allowed to take their lunches in the Training Room. However, there is no evidence Athens ever put or permitted a microwave in the Training Room. To the contrary, in the video of the Union's trespassing, there does appear to be a microwave on the counter in the Training Room. Er. Ex. 23. However, also clear in the video, is that the microwave that is supposed to be in the Break Room under the bright yellow warning sign is missing. Er. Ex. 23; Er. Ex. 4. In comparing the trespassing video and the photographs of the Break Room, it is likely that the microwave from the Break Room was (without authorization) moved into the Training Room. Er. Ex. 23; Er. Ex. 4; Tr., 1790:3-1791:25 (Martorana). Anyone who has ever owned a microwave understands that it is not difficult to move a microwave from one room to an adjacent room, and anyone could have done this. Certainly, the credible evidence established Athens management had no knowledge it had been moved. Tr., 1657:3-9 (Ramirez); 1791:21-25 (Martorana).

Importantly, in the video, there is no bright yellow warning sign above the microwave in the Training Room. Er. Ex. 23. The unrefuted testimony showed that it is Athens' safety protocol that each microwave has a bright yellow warning sign above it. Tr., 1655:12-21, 1657:6-9 (Ramirez). This indicates that the microwave should not have been in the Training Room and was not a permanent fixture there. Moreover, Ramirez and Martorana both testified that they have not seen a microwave in the Training Room before. Tr., 1657:3-5 (Ramirez); 1791:21-22 (Martorana). Athens has never authorized a microwave to be placed in the Training Room or for the microwave in the Break Room to be moved to the Training Room. Tr., 1790:3-18, 1791:21-25 (Martorana); 1657:6-9 (Ramirez). Thus, even if the microwave was in the Training Room for a period of time, it was not authorized and should not have been there. Consequently, the fact that a microwave

was in the Training Room but did not have a yellow warning sign above it, coupled with the testimony that a microwave was not authorized to be in the Training Room, supports Athens' policy that the Training Room is not for taking lunches or breaks.

The General Counsel has failed to meets its burden regarding the alleged change. Accordingly, the allegation in Paragraph 15 of the Complaint should be dismissed.

3. <u>The Alleged Change is Not a Material, Significant, and Substantial Change.</u>

Even assuming *arguendo* Athens previously allowed employees to eat their lunches in the Training Room, this is not a material, significant, and substantial change. "An employer violates Section 8(a)(5) and (1) of the Act when it unilaterally changes the wages, hours, or other terms and conditions of employment of bargaining unit employees without first providing the collective-bargaining representative with notice and a meaningful opportunity to bargain." *Pan American Grain Co.*, 343 NLRB 318, 330-31 (2004) (citations omitted). However, "[t]he Board has made clear that in order to constitute a unilateral change that violates the Act, the employer's action must be a material, substantial, and significant change that has a real impact on, or causes a significant detriment to, the employees or their working conditions." *Pan American Grain Co.*, 343 NLRB 318, 331 (2004) (citations omitted). An employer is not obligated to bargain with the Union over a change to working conditions that is "*de minimis*." *Success Village Apartments, Inc.*, 348 NLRB 579, 580 (2006) (no substantial change in the terms and conditions of employment where "only change resulting from the Respondent's new parking policy is that employees now have to walk approximately 200 additional yards from their vehicles to the main building."); *Berkshire Nursing Home, LLC* , 345 NLRB 220, 220 (2005) (holding that "we do not find that the difference between a 1-minute walk and a 3- to 5-minute walk from the parking lot to the entrance is a sufficiently significant difference to warrant imposing a bargaining obligation on the respondent before making this change.")

The alleged change here, that employees can no longer eat in the Training Room, is not material, significant, or substantial, but rather *de minimis*. There are at least three other areas within the Pacoima Yard in which the employees can enjoy their lunch. The first place is the Break Room, which is adjacent to the Training Room and actually closer to the employees' work area. Moreover, the Break Room has everything any employee could hope to have in a lunch area: a refrigerator, an ice machine, a water dispenser, a coffee machine, a microwave, multiple food and drink items for purchase, and of course, tables and chairs. Er. Ex. 4.

Although in the next section it will be proven that the testimony regarding the Break Room always being full of drivers during the Shop employees lunch time is false, even if that is taken as true, there are still multiple areas in which the Shop employees can eat lunch altogether. There is the Kitchen, which is less than a minute away from the Break Room and Training Room. The Kitchen contains another refrigerator, a microwave, a coffee machine, and enough tables and chairs for at least twelve people. Tr., 1649:12-1650:6 (Ramirez). There is also an area to eat lunch right in the Shop itself, which has a fridge, a microwave, portable stand-up heaters, and enough tables and chairs for fifteen people. Tr., 1651:1-1652:3 (Ramirez). Lastly, if the employees wanted, they can eat outside by a tree in the corner of the parking lot. Tr., 1826:1-6 (Martorana). Accordingly, there are multiple other areas that the employees can eat their lunches that actually are more convenient and more conducive for lunch breaks than the Training Room.

Additionally, it does not matter if Athens employees would prefer to eat in the Training Room rather than the other areas provided as "the relevant inquiry is not employee preference, but whether the change properly can be characterized as 'material, substantial, and significant.'" *Berkshire Nursing Home, LLC*, 345 NLRB 220, 220 (2005). The alleged change here cannot be

characterized as material, substantial, and significant.[36] At most, it is a *de minimis* change. Accordingly, this allegation should be dismissed.

4. The Testimony of Jose Maldonado and David Maldonado Regarding the Break Room and Their Lunch Breaks was Affirmatively Impeached.

The testimony of Jose Maldonado and David Maldonado regarding the Break Room and other areas to eat lunch at the Pacoima Yard was impeached because it is inconsistent and contradicted by credible evidence.

First, Jose Maldonado's and David Maldonado's claim that they could not eat lunch in the Break Room because the drivers were using the tables is not credible. Jose Maldonado claimed that it is an issue "every day" that the drivers are using the tables in the Break Room preventing the Shop employees from eating there. Tr., 95:10-11, 96:11-16 (J. Maldonado). At first on direct he claimed that sometimes there are probably fifteen to twenty drivers there each day. Tr., 96:17-20 (J. Maldonado). However, he changed his testimony on redirect to state that there would typically be five to six drivers in that area during his lunch. Tr., 225:3-5 (J. Maldonado). David Maldonado also claimed that the Shop employees cannot eat there because of the drivers but he stated that there are "[t]en drivers, or seven drivers that are sitting there." Tr., 283:2-11, 283:22-25 (D. Maldonado). Thus, this testimony regarding the drivers using the Break Room tables during the Shop employees lunch time is inconsistent. Moreover, David Maldonado testified that at the time of the incident, he typically took his lunch from 7:00 to 7:30 PM on Monday through

[36] The General Counsel or Union may argue that the Training Room was more private than the Break Room. However, this claim is not born out by the facts which indicated that most Athens management was ordinarily gone by the time Shop employees took their meal breaks and the remaining management, Martorana, did not have an office in an area which could even see the Break Room. Tr., 1878:21-23 (Solis); 1825:14-21 (Martorana); Er. Ex. 2. Moreover, the Kitchen, which was both available and in close proximity, provided the same, if not more privacy than the Training Room. Er. Ex. 2. Most important, the General Counsel and Union failed to establish that private meal periods are even an appropriate term of employment, much less that it is a material, substantial, and significant term. In fact, the Respondent is not aware of, and the General Counsel did not refer to, any case in which the privacy of a break room was considered a material, substantial or significant term of employment.

Wednesday and from 6:00 to 6:30 PM on Thursday through Friday. Tr., 273:5-8 (D. Maldonado). Jose Maldonado testified that he typically took his meal periods at 6:00 PM. Tr., 87:15-19, 182:18-20 (J. Maldonado). Thus, three days of the week there would have to be numerous drivers who stayed past 7:00 PM and past 6:00 PM on the other days to interfere with the lunch of the Shop employees. However, the record evidence established drivers were not in the Break Room at these times.

The testimony of Jose Maldonado and David Maldonado regarding the drivers using the Break Tables during their lunch hour was directly contradicted by Ernesto Calvillo ("Calvillo"). Calvillo, who has been a driver at the Pacoima Yard for about five years, testified that a majority of the drivers fill out their post-trip paperwork in their trucks. Tr., 1450:2-11, 1455:17-19 (Calvillo). While some of the drivers fill out their paperwork inside the building, most of the ones that do, do so in the Dispatch area on the counters. Tr., 1455:20-22, 1455:23-1456:6 (Calvillo). Calvillo has only seen a couple of drivers filling out their paperwork at the tables in the Break Room, but he has never seen the tables full because drivers are sitting there. Tr., 1456:11-13, 1456:21-23 (Calvillo). At the most, he has seen seven drivers at the Break Room tables but that is between 4:25 and 5:10 PM, and it takes at most fifteen minutes to fill out the paperwork. Tr., 1458:10-21, 1454:3-4 (Calvillo). In fact, as testified to by Calvillo and Martorana, most of the drivers have finished work and left the Pacoima Yard by 5:00 PM at the latest on a typical day. Tr., 1457:7-9 (Calvillo); 1788:20-1789:5 (Martorana). Therefore, it would be impossible for large numbers of drivers to be filling the Break Room tables after 6:00 PM, leaving the tables completely open for shop employees to use.

The testimony of Calvillo is supported by the time records, which show only a minimum amount of drivers (six at 6:00 PM and five at 6:30 PM) who clocked out after 6:00 PM and only

one driver clocking out after 7:00 PM. Er. Ex. 17. Further in support of Calvillo's testimony and contrary to the testimony of Jose Maldonado and David Maldonado, in the video of the Union trespassing, the Break Room tables are completely empty during the lunch time of the Shop employees. Er. Ex. 23. Accordingly, Jose Maldonado's and David Maldonado's testimony that Shop employees cannot eat their lunch in the Break Room because of the drivers using the tables to fill out their paperwork is not credible.

Further impeaching both Jose Maldonado's and David Maldonado's testimony is that the time records disprove their claim that all shop employees eat lunch together. Er. Ex. 18. While there can be no doubt that some groups of Shop employees appear to take lunch at the same time, Jose Maldonado's claim that everybody in the Shop always takes their meal periods at the same time or David Maldonado's claim that the day of the incident they made up a group of "like 20 guys" is clearly false. Er Ex. 18; Tr., 186:17-25 (J. Maldonado); 284:5-6 (D. Maldonado). Thus, even if a few drivers were using the Break Room tables, there would still be room for the various groups of Shop employees to eat their lunch.

Additionally, the time records for August 2, 2018, further prove that Jose Maldonado's and David Maldonado's testimony is not credible as they stated they were on their lunch break when the trespassing Union representatives met with them in the Training Room. Er. Ex. 18. The time records show that Jose Maldonado started his lunch break at 5:58 PM and then clocked back in for work at 6:28 PM. Er. Ex. 18. Likewise, David Maldonado, clocked out for his lunch break at 6:03 PM and then clocked back in for work at 6:33 PM. Er. Ex. 18. As shown in the video, it is clear that the Union representatives entered into the room after 6:30 PM or 6:35 PM. Er. Ex. 23. Accordingly, Jose Maldonado and David Maldonado were caught red handed lying about when

they took their lunch break and meeting with Union representatives even though they were on Company time. Er. Ex. 22. They are not credible witnesses.

Moreover, the testimony of Jose Maldonado and David Maldonado regarding the lock on the door to the Training Room was in direct contradiction of each other. Jose Maldonado testified that there was not a lock on the Training Room door prior to the August 2nd trespassing, and that he was "100 percent sure" of this. Tr., 204:8-15, 239:16-24 (J. Maldonado). However, David Maldonado on the other hand testified that there was a lock prior to the August 2nd, but that it was not working so Athens fixed it the day after the incident. Tr., 282:13-23, 365:23-25 (D. Maldonado). Accordingly, David Maldonado's statement regarding the lock stands in stark contrast to Jose's "100 percent sure" testimony that prior to the incident there was only a door handle and no lock on the door. Moreover, the testimony of Ramirez and Martorana confirm that there has always been a lock on the Training Room door. Tr., 1656:12-16 (Ramirez); 1793:2-14 (Martorana).

Lastly, Jose Maldonado testified that there is nowhere else at the Pacoima yard to eat lunch outside of the Break Room and the Training Room. Tr., 95:13-1 (J. Maldonado). David Maldonado claimed that because they are not allowed to eat in the Training Room and the Break Room is allegedly always full of drivers, the Shop employees have no place to eat so they decided to eat in the parking lot. Tr., 283:2-11, 284:7-9 (D. Maldonado). However, these statements are not credible, as explained above, there is the Kitchen and also an area in the Shop for employees to take their lunches. Jose Maldonado even admitted that he has never been told that the Shop employees cannot use the Kitchen, they simply choose not to. Tr., 214:10-25 (J. Maldonado). The Shop employees are of course welcome to eat their lunch outside but they have multiple areas to eat inside the Pacoima building if they choose.

Accordingly, the testimony of Jose Maldonado and David Maldonado regarding their lunch breaks, the Break Room, and their use of the Training Room was impeached and is simply not credible.

5. Even if this is Considered a Substantial Change, Athens Provided the Union with Notice and an Opportunity to Bargain.

Finally, even if this is considered to be a change, and a material, substantial, and significant change at that, Athens did provide the Union with Notice and an opportunity to bargain over use of the Training Room.

Early in the afternoon, around 1:00 or 2:00 PM, of the August 2nd trespass, HR Manager Ramirez saw a Republic Services', a competitor of Athens, driver entering onto the Pacoima Yard premises with a Union representative. Tr., 1632:16-22, 1633:16-23, 1635:14-16 (Ramirez). Ramirez walked over toward them and gestured for the Union representative to come talk to her. Tr., 1633:24-1634:13 (Ramirez). Ramirez let the Union representative know that he was allowed to enter on the premises but that the Republic driver should not be on the property so to please have him stay off the property. Tr., 1634:14-19 (Ramirez). The Union representative first told Ramirez no, but she asked him nicely again, and the Union representative and the Republic driver walked off the premises. Tr., 1634:20-1635:13 (Ramirez).

Nonetheless, a few hours later, between 3:30 and 5:00 PM, Ramirez looked out her window and saw that the Republic driver was again on the Pacoima Yard property with Union representatives. Tr., 1636:1-3, 1636:15-22 (Ramirez). Once again, Ramirez gestured to one of the Union representatives, a different one than earlier, and reminded the Union representative that they were allowed to be on the property but the Republic driver was not. Tr., 1635:24-1636:11, 1637:11-18 (Ramirez). The Union representative stated that they had the right to be there. Tr., 1637:21-23 (Ramirez). Ramirez agreed with the Union representative and told him that although

the Union representatives had a right to be there, the Republic driver did not and he needed to please leave the premises. Tr., 1637:24-1638:3 (Ramirez). Eventually, after going back and forth with Ramirez, the Union representatives and the Republic driver exited the premises. 1638:4-9 (Ramirez).[37]

However, as explained above, later that day the Union representatives trespassed on to Athens' property and once again brought the Republic driver with them. During the trespass, as can be clearly heard in the video, Martorana makes it clear to the Union representatives that they are not allowed in the Training Room because they are only allowed in the common area. Er. Ex. 23. Martorana further states that the Training Room is not the common area but the Break Room is. Er. Ex. 23. The next day, the Training Room was allegedly locked. Tr., 280:18-22 (D. Maldonado).

Around the time of this second interaction between Ramirez and the Union, counsel for Athens, Abrahms, contacted the Union through email to let it know that the Union was violating the LPA by bringing unauthorized employees of Athens' competitors onto Athens' property. Er. Ex. 6; Er. Ex. 8. Moreover, Abrahms followed up with the Union on August 7, 2018, by sending them a letter detailing the ways that the Union had been violating the LPA, particularly regarding the events of August 2nd. This letter pointed out that: "Access is restricted to non-working areas and conversations with employees must occur during non-working times (before work, after work, and during meals) unless the parties mutually agree otherwise." Er. Ex. 9. The letter ends by

[37] The General Counsel may attempt to argue that Solis gave the Republic driver permission to be on the premises as long as he wore a safety vest, but this is not true. Solis did interact with Union representatives while the Republic driver was on the premises and he did tell them to have the Republic driver wear a safety vest. Tr., 1873:1-25 (Solis). Nonetheless, Solis did not give the Union permission to have the Republic driver on the property. Solis did not say anything to them about the Republic driver being allowed on Company property in that moment because he was solely concerned with safety. Tr., 1874:14-21, 1874:14-1875:1 (Solis). This does not change the fact that the Republic driver was not permitted to be on the premises and that Ramirez directly communicated this to the Union twice that day. Moreover, Solis testified that Ramirez is more knowledgeable about the LPA and he would listen to her regarding what is allowed under the agreement. Tr., 1875:17-1876:5 (Solis).

providing the Union notice that "should [the Union] wish to discuss this matter further, please do not hesitate to contact me." Er. Ex. 9.

Based on the statements made by Martorana during the trespass, the email exchange between Athens' counsel and the counsel of the Union on August 2nd, that the Training Room door was locked the day after the trespass, and the letter sent to the Union on August 7th, Athens made it abundantly clear that their position was that the Training Room was a work area, not a common area, and that it could not be used for employees' breaks or lunches. Thus, the Union was put on notice of Athens' position. Moreover, in the letter dated August 7, 2018, Athens gave the Union the opportunity to bargain over the use of the Training Room by inviting the Union to discuss these matters with Athens. The Union simply chose not to.

Accordingly, this allegation should also be dismissed because Athens provided the Union with notice and a meaningful opportunity to bargain over the alleged change.

V. ATHENS' LASO/TORRANCE YARD DID NOT VIOLATE THE ACT.

The General Counsel alleges two violations of the Act occurred at Athens LASO/Torrance Yard. Both involve former LASO employee Michael Bermudez. Both were shown to be demonstrably meritless.

A. Athens Did Not Unlawfully Solicit or Interrogate Michael Bermudez.

The first LASO allegation outlandishly claims LASO management solicited and interrogated Bermudez during an investigatory meeting regarding potential disciplinary action for violation of the Company's Cell Phone Policy. Namely, Bermudez, who quickly had earned an extensive disciplinary record and was on the verge of termination by March 2018, claimed he was called into a meeting in March 2018 and asked how he felt about the Union and whether he would assist in decertification. As detailed below, the General Counsel failed to meet their burden to

establish any violation of the Act as the credible evidence presented at the Hearing revealed this allegation to be meritless.

1. Relevant Facts.

a. Athens' Relevant Policies.

i. Athens' Disciplinary Policy.

Pursuant to Athens' Discipline Policy in effect in 2018, the Company had five levels of discipline it could issue: verbal warning, written warning, suspension, final warning and termination. Tr., 1568:12-19, 1568:20-1569:14, 1571:11-21 (Ramirez). The level of discipline issued depends on the severity of the misconduct and the employees' disciplinary history over the past two years.[38]

Moreover, Athens has three separate disciplinary tracks: Attendance, Safety and Performance. Tr., 1570:9-1571:10 (Ramirez), 1946:17-25 (Naeole). Accordingly, Athens does not consider an employee's disciplinary history for Safety or Attendance violations when issuing discipline for a Performance violation. *Id*. Likewise, Athens does not consider an employee's disciplinary history for Performance or Attendance violations when disciplining an employee for a Safety violation. *Id*.

ii. Athens' Cell Phone Policy.

Athens maintains a policy that prohibits the use of cell phones while driving. This policy provides:

> In the interest of the safety of our employees and the public, Company employees are prohibited from using cell phones (including all smart phones) while driving on Company business and/or Company time.
>
> If your job requires that you keep your cell phone turned on while you are driving, you must use a hands-free device. Under no

[38] Attendance disciplines review only the previous six months.

> circumstances should employees place phone calls while operating a motor vehicle while driving on Company business and/or Company time. Violating this policy is a violation of law and a violation of Company rules…
>
> Violating this policy is a violation of law and a violation of Company rules.

Jt. Ex. 55. No. 6; Jt. Ex. 61.

Driving while talking on a cell phone is a safety violation under Athens' policies. Tr., 1947:1-16 (Naeole).

b. <u>Disciplines of Michael Bermudez.</u>

Bermudez was a driver in Athens' Torrance yard. In his brief, two-year tenure at Athens, Bermudez racked up a lengthy and steadily deteriorating disciplinary record.

i. On June 21, 2016, just six months after starting his job with Athens, Bermudez received a Safety verbal notice because he failed to check and properly secure his load, which caused a piece of wood to fall out of his vehicle and crack the windshield of an Athens' truck. Bermudez signed the notice without comment or protest. GC Ex. 7.

ii. On December 15, 2016, Bermudez received a one-day Safety suspension for a preventable backing accident. Specifically, Bermudez failed to follow backing protocol and have a co-worker spot him while backing up. As a result, Bermudez backed into a parked car and damaged it. Bermudez signed the notice of suspension without comment or protest. GC Ex. 8.

iii. On April 25, 2017, Bermudez received an Attendance written warning after he had two consecutive unexcused absences. GC Ex. 9.

iv. On April 27, 2017, Bermudez received a Performance final warning after he used a highly offensive, derogatory racial slur ("*nigger*") while speaking to another employee.[39] GC Ex. 10.

v. On February 6, 2018, Bermudez was involved in a second preventable accident when he failed to clear low-hanging telephone wires and struck them with the truck when he dumped his load. GC Ex. 11. Bermudez received a Safety final warning for this preventable incident. *Id.* Although Bermudez had already received a Performance final warning, because Safety was a separate track this discipline progressed off his December 2016 Safety suspension.

vi. On May 16, 2018, Bermudez received an Attendance verbal notice after he incurred an unexcused absence in violation of the Company's Attendance policy. GC Ex. 12.

Thus, as of March 2018, Bermudez had a final warning for both Safety and Performance, and any further workplace violations (other than attendance) would result in his termination. GC Ex. 10 and 11; Jt. Ex. 55, No. 2; Jt. Ex. 57; Tr., 1575:11-21, 1577:25-1578:3, 1580:9-13 (Ramirez), 1908:3-14, 1944:22-1945:6 (Naeole), 1998:12-15, 2010:23-2011:10, 2026:2-7 (Martinez).

c. <u>Athens Investigates An Alleged Cell Phone Policy Violation by Bermudez.</u>

In March 2018, Supervisor Carlos Altamirano came into Operations Manager Matthew Martinez's office and reported that he observed Bermudez talking on his cell phone while driving, which is both a Safety and legal violation. Tr., 1997:14-24 (Martinez). At this time, Bermudez had a final warning for a Safety violation, which he had received just *one month* prior. GC Ex. 11.

[39] Shockingly, at Hearing, Bermudez testified that he did not believe using this awful racial slur at work was inappropriate. Tr., 637:22-25 (Bermudez).

Kam Naeole, Bermudez' immediate supervisor, was in Martinez's office when Altamirano reported Bermudez' conduct, and when he heard the report, he reminded Martinez that Bermudez already had a final warning for Safety and should be terminated for any additional Safety violations. Tr., 1904:4-10 (Naeole), 1905:1-16 (Naeole), 1918:7-25 (Naeole), 1997:25-1998:15 (Martinez).

Martinez conveyed Altamirano's report to General Manager Michael Liedelmeyer, who subsequently convened an investigatory meeting with Naeole, Martinez, and Bermudez. Tr., 1999:12-2000:23 (Martinez). Liedelmeyer started the meeting by asking Bermudez if he knew why he was there, and Bermudez said he did not. Tr., 2002:24-2003:9 (Martinez), 2071:9-14 (Liedelmeyer). Liedelmeyer then informed Bermudez that Altramirano saw him talking on his cell phone while driving, and Liedelmeyer asked Bermudez if Altamirano's report was true. Tr., 1909:5-15 (Naeole), Tr., 2003:10-21 (Martinez), 2072:2-16 (Liedelmeyer). Bermudez denied the allegation. *Id.* To test how steadfast Bermudez was in his denial, Liedelmeyer told Bermudez he could pull Bermudez' cell phone records, and Bermudez said "[G]o ahead." Tr., 1951:10-21 (Naeole), 2003:22-2004:3 (Martinez), 2072:17-2073:7 (Liedelmeyer).

At that point, Liedelmeyer called Altamirano on the two-way radio so that everyone in the room could hear Altamirano. Tr., 1909:16-1910:8 (Naeole), 2004:4-16 (Martinez), 2073:9-2073:5 (Liedelmeyer). Liedelmeyer asked Altamirano to validate what he saw, and Altamirano confirmed what he reported to Martinez. *Id.*

After the call with Altamirano ended, Bermudez again reiterated that he was not talking on his cell phone, but said he may have been momentarily looking at his phone to change the Pandora radio station on his cell phone. Tr., 1911:9-1910:5 (Naeole), 2004:22-2005:5 (Martinez), 2074:9-15 (Liedelmeyer). Having obtained Bermudez' side of the story, Liedelmeyer informed Bermudez

he would confer with Martinez and Naeole about what, if any, discipline would be issued and adjourned the meeting. During this meeting, there was absolutely no discussion regarding Bermudez' support for the Union or any decertification efforts. Tr., 1913:20-22, 1915:7-1917:10 (Naeole); 2007:11-2009:15 (Martinez), 2077:9-2079:7 (Liedelmeyer). In fact, Naeole, Martinez and Liedelmeyer each credibly testified and refuted each of Bermudez' fanciful and nonsensible claims in this regard. Tr., 2005:14-23 (Martinez), 2075:1-12 (Liedelmeyer).

Both Martinez and Naeole believed Bermudez should be terminated based on his disciplinary history. Tr., 1918:7-25 (Naeole), 1919:5-14 (Naeole), 1999:12-2000:8 (Martinez), 2009:16-2010:17 (Martinez), 2076:4-24 (Liedelmeyer). Liedelmeyer, however, ultimately decided there was insufficient evidence to discipline Bermudez because Bermudez provided a plausible and innocuous explanation for what Altamirano saw and there was no evidence to corroborate Altamirano's report. Tr., 2076:4-24 (Liedelmeyer).

The next day, Liedelmeyer instructed Naeole to relay his decision to Bermudez. Tr., 2076:25-8 (Liedelmeyer), 1919:15-1920:3 (Naeole). When Naeole did this, Bermudez expressed relief and gratitude that he would not be terminated. Tr., 1920:4-13 (Naeole).

2. Legal Analysis.

a. There is No Credible Evidence that Athens Interrogated Bermudez About the Union or Solicited His Support for Decertification of the Union.

There is no credible evidence that Athens interrogated Bermudez about his support for the Union or solicited Bermudez' support for the decertification of the Union. At the crux of all unlawful interrogation and solicitation charges is some question or soliciting statement or act that coerced or restrained employees in their exercise of Section 7 rights. *See*, *e.g.*, *Westwood Healthcare Center*, 330 NLRB 935, 949 (2000); *D & H Manufacturing*, 239 NLRB 393 (1978).

The credible evidence in this case overwhelming proves no such statement, act, or question occurred here.

Resolving credibility implicates a number of factors:

> The standard guide for determining credibility…is to take in the apparent interests of the witnesses; the inherent probabilities in light of other events; corroboration or the lack of it; the consistencies or inconsistencies within the testimony of each witness and between the testimony of each and that of other witnesses with similar apparent interests.

Fantasia Fresh Juice Company and Manufacturing, 335 NLRB 754, 760 (2001).

Applying these factors here, the testimony of Athens' three witnesses is far more credible than Bermudez' outlandish claims. Liedelmeyer, Martinez, and Naeole all credibly and consistently testified that the purpose of the March 2018 meeting was to investigate Bermudez' alleged cell phone violation, and at no point did any manager ask Bermudez about his sentiments for the Union or solicit his support for decertification of the Union.[40] Tr., 1913:20-22, 1915:7-1917:10 (Naeole), 2007:11-2009:15 (Martinez), 2077:9-2079:7 (Liedelmeyer). The testimony of these three witnesses corroborate each other, and the General Counsel failed to proffer any evidence whatsoever to impeach their credibility.

The General Counsel's case rests entirely on Bermudez' unbelievable testimony that Liedelmeyer asked him how he felt about the Union and then asked him to assist in decertifying the Union. Tr., 507:14-21, 508:11-24 (Bermudez). Not only is Bermudez' testimony contradicted by three credible witnesses, but it is inherently improbable. First, it was well known throughout the yard that Bermudez was a Union supporter as, by this point, he had been a member of the Union's bargaining committee for months. Jt. Ex. 62; Tr., 2012:4-22 (Martinez). Liedelmeyer

[40] Ironically, had Athens actually been looking to discriminate or retaliate against Bermudez, it would have likely decided to take the observing supervisor's word over his and just terminated him. The fact that it did not belies the Union's theory.

had no reason to ask Bermudez how he felt about the Union because Liedelmeyer already knew how Bermudez felt about the Union.

Second, it would be simply nonsensical to credit Bermudez' claim that Liedelmeyer, a seasoned manager who had been directed to remain neutral on Union issues and understood he could be terminated if he did not, decided to risk his job and, in front of two other manager witnesses who had also been trained to remain neutral and understood they could be terminated if they did not, asked a known Union adherent to abandon his strong Union sentiments and support decertification instead. Tr., 1902:6-1904:3 (Naeole), Tr., 1995:11-23 (Martinez); 2061:6-2062:1 (Liedelmeyer). Additionally, under Bermudez' scenario, Naeole and Martinez must have conspired with Liedelmeyer to conceal his misconduct, lied under oath to protect him, and willingly placed their own jobs at risk to cover up Liedelmeyer's misdeed. It is nothing short of ridiculous to suggest Liedelmeyer, Martinez and Naeole would take such risks for as futile an exercise as asking a known Union supporter to assist in decertifying the Union. The General Counsel presented absolutely no evidence from which it could be inferred that Liedelmeyer, Martinez, and Naeole had any motivation to engage in such blatant dishonesty.

Bermudez' testimony is rendered even more unbelievable by some of the completely nonsensical claims he made. For example, Bermudez said Liedelmeyer said he wanted to terminate Bermudez, but Martinez and Naeole convinced him not to. Tr., 569:25-570:19 (Bermudez). This testimony makes no sense. Tr., 1952:13-17 (Naeole). Liedelmeyer outranks Martinez and Naeole so it is illogical that he would tell Bermudez that two lower ranking managers overrode his desire to terminate Bermudez. Moreover, Naeole, Martinez, and Liedelmeyer all testified that, in fact, Naeole and Martinez wanted to terminate Bermudez but Liedelmeyer overruled their recommendation for lack of sufficient evidence. Tr., 1918:7-25 (Naeole), 1919:5-

14 (Naeole), 1999:12-2000:8 (Martinez), 2009:16-2010:17 (Martinez), 2076:4-24 (Liedelmeyer). Thus, in addition to being illogical, Bermudez' testimony is squarely contradicted by credible testimony.

Even more nonsensical, Bermudez testified he was not worried about being terminated when Liedelmeyer allegedly said he wanted to terminate Bermudez, and he only became worried about termination *after* Liedelmeyer said this, when Liedelmeyer allegedly started talking about Bermudez' Union affiliation. Tr., 571:11-572:8 (Bermudez). For Bermudez to claim that he was not worried about termination when the highest ranking manager at the yard told Bermudez he wanted to fire him for a safety violation another supervisor said he witnessed, but then suddenly became worried when Liedelmeyer allegedly started talking about Bermudez' Union affiliation, which was already a well-known fact in the yard, is simply ridiculous. Obviously, Bermudez was attempting to tailor this testimony to what he believed would make a stronger case against Athens. In doing so, though, he revealed his utter lack of credibility.

Bermudez also testified that *after* he refused Liedelmeyer's alleged request to assist with decertification, Liedelmeyer gave him the names of other "allies", *i.e.*, anti-union employees, in the yard. Tr., 509:22-11-510:11 (Bermudez). Not only did the other witnesses refute this testimony, but once again, this testimony is illogical. Tr., 1916:14-18 (Naeole), 2078:21-2079:7 (Liedelmeyer). If Liedelmeyer was truly bent on clandestinely soliciting employees' support for decertification, something he admittedly knew could lead to his termination, he certainly would not "out" the other employees assisting him in this prohibited endeavor to a staunch Union supporter who, just minutes before, refused to help with decertification.

As yet another example of Bermudez' complete lack of credibility, Bermudez testified that Liedelmeyer discussed a six-month probation with Bermudez. Tr., 505:14-18 (Bermudez).

However, there is no such thing as a six-month probation under Athens' disciplinary policies. Jt. Ex. 57, Tr., 2078:24-2079:1 (Liedelmeyer).

Belying Bermudez' credibility even more, neither Bermudez nor the Union reported this incident to Athens even though it had ample opportunity to do so. On May 30, 2018 during collective bargaining negotiations, the Union read a statement prepared by Bermudez in which Bermudez reported that other non-supervisory employees were engaged in decertification activities. Tr., 514:5-520:14 (Bermudez). After listening to Bermudez' statement, on both May 30 and 31, Abrahms assured the Union bargaining committee that Athens would investigate these claims, promised no reprisal for speaking up, and encouraged the bargaining team members to report any other incidents of which they were aware. Tr., 2119:18-2125:8 (Torres); 2237:1-2246:19 (Abrahms). However, although Liedelmeyer's alleged interrogation and solicitation occurred a mere two months earlier, neither the Union nor Bermudez reported this alleged conduct. Tr., 583:17-584:10 (Bermudez). Bermudez obviously felt comfortable enough to speak up about other alleged incidents, so the fact that he did not raise Liedelmeyer's alleged interrogation and solicitation, which would presumably be far more concerning than solicitation by non-supervisory employees, leads to only one reasonable conclusion – this incident never occurred.

Accordingly, there is no compelling basis to find merit in this allegation, and it must be dismissed.

B. <u>Bermudez' Termination Did Not Violate the Act.</u>

The Second LASO allegation claims Bermudez was terminated in violation of Section 8(a)(5) because of this protected activity, including the statement read during negotiations. The Hearing evidence, however, established that Bermudez was lawfully terminated for insubordination.

1. Relevant Facts.

a. Athens Terminates Bermudez After He Engaged in Insubordination.

i. Overweight Trucks.

Pursuant to DOT regulations, trash trucks cannot exceed a certain weight limit. Tr., 1921:12-1923:18 (Naeole), 2013:2-9 (Martinez), 2015:2-7 (Martinez), 2018:16-2019:16 (Martinez). If they do, the Company can be fined and the truck can be impounded. *Id.* Overweight trucks are also a safety hazard. *Id.* When a truck is overweight, its center of gravity shifts, the truck is more prone to roll over and the brakes can fail. *Id.* Finally, some of the cities Athens serves separately mandate and audit Athens' compliance and can sanction them for overweight issues. Tr., 2018:16-2019:16 (Martinez). Accordingly, Athens strives to minimize overweight trucks by periodically auditing routes and modifying them as necessary. Tr., 1989:4-24 (Naeole), Tr., 2015:8-14 (Martinez). Athens also makes weight compliance an expectation of management which can impact managers' bonuses or even employment. Tr., 2015:8-14. 2016:15-2017:10, 2019:25-2020:4 (Martinez).

The trash trucks are not equipped with a weight gauge, but experienced drivers can tell when trucks become overweight because the truck drives differently. Tr., 1923:23-1924:16 (Naeole), 2015:15-2016:14 (Martinez), 2017:13-2018:4 (Martinez). Specifically, the truck will accelerate slower, it cannot take turns as fast, and it takes longer to break. *Id.* Experienced drivers like Bermudez would be able to, and are expected to, recognize these tell-tale signs of an overweight load. *Id.* Notably, an overweight truck is not necessarily a full truck. Tr., 1934:8-12 (Naeole). Thus, a truck's ability to "pack"[41] trash is not necessarily indicative of an overweight

[41] Trucks are equipped with a "packer" that smashes the waste down so that additional waste can fit into the receptacle. Tr., 523:18-22 (Bermudez).

truck, and drivers are expected to be able to recognize the other, more reliable indicators in how the truck drives.

ii. Bermudez Insubordinately Disregards His Supervisor's Directive.

Bermudez drove a regular route in the City of Redondo Beach. June 2, 2018 was the Saturday after Memorial Day, and Athens does not collect trash on Memorial Day in Redondo Beach, so residential trash collections were delayed by one day, meaning there was an extra day of trash to be collected that Saturday. Tr., 1926:2-23, 1929:1-1930:15. Additionally, trash collection the week after a holiday generally tends to be much heavier than non-holiday collections. *Id.* In preparation for this heavier than usual collection day, Athens brought in extra drivers to assist. Tr., 1930:16-1931:6 (Naeole).

In addition to the impact of the holiday, Bermudez' route had been overweight in the past, and Fridays (which was being collected on Saturday) were particularly heavy days. Tr., 1926:7-1924:24 (Naeole). In fact, Naeole had actually tried to adjust Bermudez' route before, but the adjustment had minimal impact so Naeole changed it back. *Id.*

Anticipating Bermudez' load would be particularly heavy on June 2, at the morning huddle, Naeole informed Bermudez to call when him when Bermudez' truck neared its maximum weight so Naeole could send another driver to help Bermudez. Tr., 1931:15-1933:1 (Naeole), 1933:23-1935:19 (Naeole). Bermudez acknowledged the directive and then set out on his route. *Id.*

By mid-morning, Naeole had not heard from Bermudez even though he would have expected Bermudez' truck to be getting heavy by that point, so he contacted Bermudez. Tr., 1935:20-1936:8 (Naeole). When he did, Bermudez indicated his truck was nearing capacity. Tr., 1936:11-1938:20 (Naeole). Accordingly, Naeole instructed Bermudez to stop collecting trash, wait at his current location for another driver, and swap trucks with that driver. *Id.* Bermudez

confirmed the directive. *Id.* After that, Naeole contacted Jacinto Pimentel, gave him Bermudez' location, and instructed him to swap trucks with Bermudez. Tr., 1938:21-25 (Naeole).

When Pimentel arrived at Bermudez' location, though, Bermudez refused to switch trucks as directed by Naeole. GC Ex. 30; Tr., 1940:16-1942:4 (Naeole), 1942:19-1943:1 (Naeole). Instead, he continued to collect trash in his overweight truck. *Id.*

Naeole was nearby collecting e-waste and white goods when he noticed two Athens' trucks in the general vicinity where he told Pimentel to meet Bermudez. GC Ex. 5; Tr., 1939:1-1940:15 (Naeole). Specifically, one truck was parked at the intersection where Naeole told Pimentel to meet Bermudez and the other was further down the street. *Id.* By this time, Naeole expected the drivers would have already completed the transfer, with Jacinto driving Bermudez' truck to the dump and Bermudez completing the route in Jacinto's truck, so he was surprised to see two trucks in that area. *Id.* Accordingly, Naeole contacted Bermudez, and when he did, Bermudez said he had not switched trucks because he could still pack and thought it would be faster. GC Ex. 5; Tr., 1940:16-1942:4 (Naeole), 1981:8-23 (Naeole), 1983:2-8 (Naeole). Upset that Bermudez blatantly disregarded his directive, Naeole responded, "We would have no need for supervisors if everyone did what they wanted." *Id.* Naeole then instructed Bermudez to immediately stop collecting trash and, since there was very little of the route left at this point, Naeole had Pimentel complete the route in his truck. GC Ex. 5; Tr., 1942:5-1943:10 (Naeole).

Naeole reported Bermudez' insubordination to Operations Manager Martinez, who then reported it to Liedelmeyer. Tr., 1943:18-7 (Naeole), 2020:5-13 (Martinez), 2021:21-2022:13 (Martinez), Tr., 2079:12-2080:6 (Liedelmeyer). Athens investigated the allegation by obtaining statements from Naeole and Pimentel, both of whom confirmed Bermudez was instructed to switch trucks but refused to do so, and reviewing Bermudez' dump ticket that day, which showed his load

was two tons overweight. GC Ex. 5; GC Ex. 30; Er. Ex. 27; Tr., 2023:12-2025:11, 2026:17-2028:8 (Martinez), 2080:20-2081:23 (Liedelmeyer).

Before calling Bermudez into an investigatory interview, though, Liedelmeyer notified Cesar Torres about the incident, and Athens decided to inform the Union about the situation before speaking to Bermudez so the Union could be present if it so choose. Tr., 2082:6-20 (Liedelmeyer) Accordingly, at the June 6 bargaining session, Athens' bargaining team asked to speak to Union Business Agent Jim Smith and Union Attorney Liz Rosenfeld in Athens' caucus room, outside the presence of the Union bargaining committee. Tr.,2133:5-2137:1 (Torres); 2248:20-2251:5 (Abrahms). Athens informed Smith and Rosenfeld what Bermudez had done and gave them a copy of his extensive disciplinary record as well as Naoele's statement. *Id.* Athens also told the Union that Bermudez was suspended, effective immediately, pending the investigation and offered to schedule the investigatory interview at the Union's convenience. *Id.*

Finally, Athens told the Union that given Bermudez' disciplinary history and the nature of the incident, should the investigation confirm the insubordination, it did not see any choice but to terminate Bermudez, but that it invited the Union to provide any reason or basis they should not terminate him, stating it would give the Union through the end of the week to do so. Tr., 2250:14-2251:5 (Abrahms); 2136:18-2137:21 (Torres).

The Union scheduled the investigatory interview for the next day, June 7, and a Union business agent accompanied Bermudez to that meeting. Tr., 2029:9-2031:9 (Martinez), 2084:11-2085:10 (Liedelmeyer), 2085:24-2087:23 (Liedelmeyer). Also present at the meeting were Martinez, Liedelmeyer and an employee from Athens' human resources department. *Id.* At the meeting, Bermudez presented a written statement in which he denied that Naeole had instructed

him to swap trucks, and he claimed he was being targeted because of his Union support. *Id.* Liedelmeyer assured Bermudez that was not the case, and the meeting adjourned. *Id.*

Other than general statements during the June 7 investigatory meeting the Union did not provide any reason or basis why Bermudez should not be terminated, nor did the Union otherwise respond to Athens' invitation to weigh in by the end of the week. Accordingly, on Monday June 11, Abrahms called the Union President, Phillips, and told him given the circumstances Athens planned to terminate Bermudez, to which Phillips responded "ok". Tr., 2251:6-2252:7 (Abrahms).

Based on Bermudez' disciplinary history, the corroborated evidence of his insubordination, and the Union's failure to present any mitigating facts, Athens terminated Bermudez in accordance with its policies. Jt. Ex. 57.

2. Bermudez' Termination Was Not Motivated by his Union Activity.

The General Counsel alleges that Athens terminated Bermudez because of his union activity, namely his statement read during negotiations. As noted above, to prove unlawful discipline under Section 8(a)(5) as a threshold matter the General Counsel must meet the *Wright Line* elements. Here they did not and the General Counsel failed to meet their burden to prove union activity motivated Athens' decision to terminate Bermudez.

a. Bermudez' Testimony Is Not Credible.

First, the General Counsel's entire case rests on Bermudez' denial that Naeole told him to switch trucks with Pimentel. Tr., 525:19-24 (Bermudez). However, three witnesses, including the General Counsel's own witness, flatly contradicted Bermudez and confirmed Naeole's directive. First, Naeole testified, consistent with his written statement, that he instructed Bermudez to switch trucks when he called Bermudez, and Bermudez acknowledged the directive. GC Ex. 5; Tr., 1936:11-1938:20 (Naeole). Second, Pimentel confirmed in his written statement that Naeole directed him to switch trucks, but when he arrived at Bermudez' location, Bermudez refused to

make the switch. GC Ex. 30. Possibly most damaging to the General Counsel's theory, the General Counsel's own witness, Luis Prado, testified he heard Naeole direct Pimentel to switch trucks, and if Naeole told Pimentel that, he surely told Bermudez the same thing. Tr., 707:6-14 (Prado). This evidence makes clear that Bermudez' self-interested denials are not credible.

In fact, Bermudez admitted that the first thing Naeole said when he spoke to Bermudez later that day was, "Hey, how come you didn't switch trucks." Tr., 534:11-22 (Bermudez), 659:25-660:3 (Bermudez).[42] If Naeole had not told Bermudez to switch trucks, as the General Counsel contends, then it makes no sense why Naeole would say that to Bermudez. The fact that Bermudez admits Naeole said this leads to the reasonable inference that Naeole, in fact, told Bermudez to switch trucks.

Indeed, Bermudez revealed his lack of credibility when he unequivocally testified there is no way to tell if the truck is overweight other than to weigh it.[43] Tr., 526:19-527:19 (Bermudez). This testimony is contradicted by two credible witnesses who provided detailed accounts of how there are tell-tale signs that an experienced driver like Bermudez should be able to recognize the weight of the truck, and the ability to pack is not a conclusive indicator. Tr., 1923:23-1924:16 (Naeole), 2015:15-2016:14 (Martinez), 2017:13-2018:4 (Martinez). Even Helper Luis Prado testified drivers told him they can tell a truck is overweight by "how the truck moves." Tr., 1687:14-21 (Prado).

[42] Notably, this admission in itself is sufficient to defeat the General Counsel's allegation as it goes to prove that, even assuming *arguendo* that Bermudez did not hear the directive or there was some miscommunication, Naeole certainly believed he had given Bermudez a directive and Bermudez insubordinately did not perform. This would establish that the motivation for the termination was Naeole's sincerely held belief Bermudez was insubordinate, a reason unrelated to his union activity.

[43] The General Counsel may also argue it was unreasonable to expect Bermudez to know when his truck is nearing its weight limit because the truck does not have a weight gauge and the truck could still pack. As a threshold matter, Bermudez was not terminated for having an overweight truck; he was terminated for insubordination after he willfully defied Naeole's directive to switch trucks. GC Ex. 13; Tr., 2035:23-24 (Martinez).

Finally, Bermudez also testified that he did not understand he could be disciplined for disregarding a supervisor's directive. Tr., 626:10-21 (Bermudez). The absurdity of such a claim is self-evident.

These credibility deficiencies, coupled with his other illogical and unbelievable claims related to the solicitation and interrogation allegation, reveal Bermudez to be not credible.

In sum, the entirety of the General Counsel's case on this allegation relies on Bermudez' credibility, which does not withstand logic, let alone the overwhelming weight of the credible evidence rebutting his uncorroborated and self-serving assertions. Without any credible supporting evidence, the allegation should be dismissed.

b. <u>The General Counsel Failed to Prove LASO Management had Knowledge of the Statement.</u>

In order to even meet their *prima facie* case the General Counsel must prove the decision makers of Bermudez' termination (LASO management) had knowledge of his protected activity. Specifically, it must be shown that Leidelmeyer, Martinez and/or Naeole knew of the statement read at the negotiations meeting. The undisputed record evidence established that they did not. Tr., 2035:6-9 (Martinez), 2091:18-2092:16 (Liedelmeyer), 2439:21-2442:5 (Pompay). The General Counsel will argue that a nexus exists because Bermudez' termination occurred approximately one week after his statement was read aloud at a bargaining session. However, the undisputed evidence shows that none of the managers who initiated and recommended Bermudez' termination knew about his statement. *Id.* In fact, the individual responsible for the investigation into the statement, Michael Pompay, confirmed that he did not tell any member of LASO management about the substance of the statement and did not tell anyone at all who made the statement. Tr., 2439:21-2442:5 (Pompay). Under these circumstances the crucial element of

knowledge is missing. *See Libertyville Toyota*, 360 NLRB 1298, 1301 (2014) (under *Wright Line*, there must be knowledge of the protected activity).

Consequently, the General Counsel completely failed to meet their *prima facie* burden to establish knowledge. Therefore, this allegation must be dismissed.

c. <u>The General Counsel Failed to Prove Union Animus.</u>

Even if the General Counsel could prove knowledge, which it cannot, they would still need to prove animus, which they did not. To the contrary, all of the credible testimony established that the LASO management all understood their obligations to remain neutral under the LPA. Tr., 2061:6-2062:1 (Liedelmeyer); 1902:6-1904:3 (Naeole); 1995:11-23 (Martinez). Moreover, the General Counsel did not put forward any credible evidence which in anyway indicated any animus.

If anything, the evidence established the opposite. By the time Bermudez was terminated, he had been on the bargaining committee for six months, and there is no claim that Bermudez was disciplined for his union activities prior to his termination. Jt. Ex. 62. Indeed, if Athens had wanted to terminate Bermudez for his union activity, it could have easily done so in March when a supervisor reported that he observed Bermudez talking on his cell phone while driving. Liedelmeyer could have easily just taken the word of a supervisor over Bermudez' and disregarded Bermudez' explanation for what the supervisor saw, but he choose not to. This is powerful persuasive proof that Athens had no animus and Bermudez' union activities had nothing to do with his termination.

Similarly, following Bermudez' insubordination Athens went out of its way to include the Union in the decision making process. It not only provided the Union advance notice and documentation, but it affirmatively scheduled the investigatory meeting to accommodate the Union. Moreover, it invited the Union to provide any reason or basis as to why Bermudez should not be terminated under the circumstances. Although the Union was not able to provide any reason

or basis, the mere fact Athens affirmatively invited the Union's participation militates against any finding of animus.

i. <u>There is No Evidence of Disparate Treatment.</u>

In some cases animus may be proven by showing a pro-union employee was disciplined more harshly than other similarly situated employees. *But see Electrolux Home Products,* 368 NLRB No. 34 at 3 (disparate treatment alone not enough). Here, however, the General Counsel did not present evidence of disparate treatment.

First, the record evidence squarely confirms Athens followed its policies, investigated the incident, and conferred with the Union before terminating Bermudez. The General Counsel may argue that Athens' should have interviewed Bermudez' and Pimentel's Helpers, but Athens decision not to does not render its investigation inadequate. Athens obtained the statements of two witnesses, Naeole and Pimentel, who unequivocally confirmed the directive, and it is completely speculative to suggest interviewing additional witnesses would have changed the outcome of the investigation. Indeed, the record evidence suggests interviewing additional witnesses would not have made a difference as one of those Helpers, Luis Prado, testified consistently with what Naeole and Pimentel reported – that Naeole directed the drivers to switch trucks, but Bermudez refused.

Second, there is absolutely no evidence that Athens did not discipline other similarly situated employees equally. At Hearing, the General Counsel intimated that Pimentel also engaged in insubordination because Naeole directed him to drop off his Helper before switching trucks with Bermudez, but he did not do so. The record evidence refutes this. The only evidence of Pimentel's unsubstantiated insubordination is an uncorroborated hearsay statement of a terminated employee who had a clear motive to lie. *Rome Electrical Systems*, 356 NLRB 170 n. 4 (2010) (the Board "may consider probative hearsay testimony that is corroborated by other evidence or otherwise inherently reliable"); *W.D. Manor Mechanical Contractors, Inc.*, 357 NLRB 1526 (2011)

(uncorroborated hearsay is entitled to "little weight"). In fact, the General Counsel could have called Pimentel to testify, and their failure to do so warrants an adverse inference that Pimentel would not have corroborated Prado's statement. *Equinox Holding, Inc.*, 364 NLRB No. 103, slip op. at 1 n. 1 (2016) (failure to call witnesses who would reasonably be in favor of the party warrants an adverse inference). More important, Naeole did not recall giving this directive to Pimentel. Tr., 1964:10-22 (Naeole). Even assuming *arguendo* Naeole gave this directive, there is no evidence that Naeole learned about Pimentel's insubordination. In fact, the evidence shows Naeole would not have known about Pimentel's insubordination because he could not see who was in the truck when he discovered the truck swap had not been completed. Tr., 1939:19-21 (Naeole). Finally, even if Pimentel was directed to drop off his Helper, that alleged insubordination would have been vastly different than Bermudez' because it did not result in a completely avoidable safety violation whereas Bermudez' did.

At Hearing, the General Counsel also implied that Pimentel was insubordinate by not switching trucks with Bermudez. However, Pimentel did not switch trucks because Bermudez refused to do so, and obviously, Pimentel could not force Bermudez to switch with him. GC Ex. 30; Tr., 1983:9-24 (Naeole). Although Prado testified that Pimentel was complaining he did not want to switch trucks before they arrived at Bermudez' location, Prado did not hear Bermudez or Pimentel discuss the truck swap when they arrived at the location, and there is no evidence that Pimentel, in fact, refused to switch trucks with Bermudez. 711:24-712:4 (Prado). To the contrary, Pimentel's written statement proves it was Bermudez, not Pimentel, who refused to switch trucks. GC Ex. 30.

Most important, neither the General Counsel nor the Union presented any evidence that there were other employees who in the past, or since, were treated differently than Bermudez under

similar circumstances. In fact, the opposite is true, the unrefuted testimony of multiple witnesses confirmed that under Athens' policy and practice termination was the only and necessary result because of Bermudez' disciplinary history. Tr., 1575:11-21, 1577:25-1578:3, 1580:9-13 (Ramirez), 1908:3-14, 1944:22-1945:6 (Naeole), 1998:12-15, 2010:23-2011:10, 2026:2-7 (Martinez).

ii. <u>There Is No Nexus to Bermudez' Protected Activity.</u>

Again the General Counsel may argue that animus can be established merely by the timing of Bermudez' termination coming so closely after the statement in negotiations. However, proximate timing by itself is not enough to establish animus. *Schuff Steel*, 367 NLRB No. 76, at 8 (2019) (holding that although timing between an employee's protected activities and the discharge is one factor to be considered regarding improper motivation, timing alone was not sufficient to demonstrate animus). Therefore there is no evidence of any nexus to Bermudez' protected activity and no animus.

Additionally, although Cesar Torres, who heard the statement in negotiations, approved Bermudez' termination, Torres merely approved the recommendation of Athens' LASO managers.[44] Tr., 1913:20-22 (Naeole), 1915:7-1917:10 (Naeole); 2007:11-2009:15 (Martinez), 2077:9-2079:7 (Liedelmeyer). Torres' minimal involvement in the termination decision cannot

[44] The General Counsel may argue that LASO management recommended a final warning prior to seeking Torres' approval, but changed the discipline to termination after Torres reviewed it. This contention is purely speculative and based solely on a draft document about which there is no testimony establishing its relevancy, who prepared it or why it was prepared. All the undisputed evidence shows that termination was warranted under Athens' Discipline Policy, the only level of discipline Liedelmeyer, Martinez, and Naeole ever considered was termination, when Liedelmeyer sought Torres' approval he recommended termination to Torres, and on June 6 when they gave the Union notice, Athens informed the Union, absent some mitigating circumstances brought forth by the Union, it had no choice but to terminate Bermudez. Tr., 1944:22-1945:6 (Naeole), 2026:2-7, 2028:18-25 (Martinez), 2083:11-23 (Liedelmeyer), 2136:18-2137:21, 2138:19-2139:4 (Torres), 2250:14-2251:5 (Abrahms). In light of this undisputed evidence, and the General Counsel's failure to proffer any evidence whatsoever to establish the document's relevancy, who prepared it, or why it was prepared, this document cannot be used to establish an inference of union animus. To the contrary, the most reasonable inference here is whoever filled out the disciplinary paperwork made a mistake or misunderstood what level of discipline Bermudez was to receive.

suffice to create a nexus based on timing alone, particular where the evidence conclusively proves Bermudez in fact engaged in an insubordinate act and the next step under Athens' disciplinary policies was necessarily termination. Moreover, the General Counsel presented absolutely no evidence that would even remotely suggest Torres harbored any animus toward the Union or Bermudez for his Union activities.

Consequently, the General Counsel completely failed to meet their *prima facie* burden to establish animus. Therefore, this allegation must be dismissed.

3. <u>Athens Would Have Taken the Same Action Irrespective of Union Activity.</u>

Although there is absolutely no credible evidence to support the Union's claim that Bermudez' discipline was in retaliation for his union activities, even if there was, Athens undisputedly would have taken the same action in absence of such protected activity.

Athens legitimately terminated Bermudez for insubordination after he willfully disregarded his supervisor's directive. During his brief two-year employment with Athens, Bermudez racked up an abysmal disciplinary history. As of June 2, 2018, Bermudez had two final written warnings – one for Safety and one for Performance. GC Ex. 10 and 11. Under Athens' policies, any further workplace violations (other than attendance) would result in Bermudez' termination.

Bermudez then willfully defied his supervisor's directive so he could complete his route quicker, and as a result, his truck ended up being two tons overweight, which is a major safety hazard and can result in fines and vehicle impoundment. Even worse, this safety hazard was completely avoidable if Bermudez had simply followed Naeole's directive. Most important, because of Bermudez' abysmal disciplinary history, the next step in the disciplinary process was termination and it was undisputed that the only disciplinary action he could have received was

termination. Thus, the only reasonable inference from this evidence is that Athens would have taken the same action in the absence of Bermudez' union activity.

a. The Union Presented No Evidence of Mitigating Factors or any Reason Not to Terminate Bermudez.

As noted above, Athens gave the Union notice of Bermudez' likely termination and an opportunity to present mitigating evidence demonstrating Bermudez should not be terminated, but it did not do so. The Union President even said "ok" when he was called and notified that given the findings (and the Union's lack of any reason not to) Bermudez would be terminated. Athens is entitled to rely on the Union's inability to present evidence of mitigating circumstances or even any reason why Bermudez should be terminated.

Accordingly, the record evidence made it abundantly clear that Athens would have terminated Bermudez for insubordination even absent any protected activity.

As noted above, there can be no unfair labor practice finding where the employer would have taken the same action absent protected activity. *Wright Line*, 251 NLRB at 1089. Consequently, this allegation must be dismissed.

VI. THE BLOCKING CHARGE POLICY ABUSE MUST BE STOPPED BY DISMISSING THE COMPLAINT.

It is no secret that unions frequently use blocking charges to delay elections seeking to remove them as the exclusive bargaining representative. *See, e.g., Shaw's Supermarkets, Inc.*, 350 NLRB 585, 589 (2007); *see also Metal Technologies, Inc. and United Steelworkers Local 2-232*, Case 30-RD-001526 (decertification petition blocked for 205 days); *Cortina's Painting, International Union of Painters & Allied Trades District Council 5 and Sergio Martinez Santos (Petitioner)* (decertification petition blocked for 170 days); *SEIU District 1199, Community Support Services, and Susan Ritz (Petitioner),* Case 8-RD-002179 (decertification petition blocked

for a year); *Pioneer Plastics*, Case 1-RD-02134 (decertification petition blocked for 102 days). In fact:

> Statistical studies indicate that the blocking charge delay…is not an anomaly. It is instead representative of a systemic problem in blocking charge cases, which have been identified as the likely cause of what has been characterized as "the long tail" of delay in the Board's processing of representation cases.

84 Fed. Reg. 39930, 39931 (2019).

Indeed, for a union bent on delaying an election at all costs, this is an easy policy to manipulate. All the union has to do is manufacture a fake credibility dispute about a matter of sufficient importance and the representation proceeding will be placed on hold until the charge can wind its way through the Board's processes. Unions know regional directors do not make credibility determinations, so levying credibility-dependent allegations at the employer almost invariably sets the representation case on a path that will take months to resolve. This works a particularly egregious injury when petitions are filed by employees who have not engaged in any wrongdoing, and scant evidence shows widespread dissemination or taint from the alleged misconduct. If the union has in fact lost majority support, clever manipulation of the blocking charge policy can allow a union to remain in power long after employees have rejected it.

That is precisely what occurred in this case. The allegations in this matter are almost entirely based on the testimony of known Union supporters whose claims are squarely refuted by overwhelming documentary evidence and credible witness testimony. Nevertheless, the Region issued a Complaint on these allegations simply because Union supporters claimed it was true, and Regions do not make credibility determinations. As a result, the decertification petitions underlying this matter have remained blocked for more than a year. This reality cannot be tolerated under an Act in which the paramount goal is to effectuate employees' freedom to choose or reject union representation.

To avoid unnecessary delay, eradicate strategic manipulation of the Board's processes, and better effectuate the Act's purpose, the blocking charge policy must be replaced by a vote-and-impound procedure. In fact, the Board recently proposed this very thing. 84 Fed. Reg. 39930, 39931-39933. As the General Counsel has previously stated, processing the decertification petitions while the Region investigates and resolves unproven unfair labor practice charges "would allow for balloting when the parties' respective arguments are fresh in the minds of unit employees" and "best satisfies the goal of guaranteeing employee choice in selecting their representative in a timely fashion." Memorandum from Peter B. Robb to the Board Re: Proposed Amendments to 2014 Election Rule: General Counsel Recommendations (April 18, 2018). Additionally, Members Marvin E. Kaplan and William J. Emanuel, former Chairman Philip A. Miscimarra and former Member Harry I. Johnson III have all signaled the blocking charge policy should be abolished. 79 Fed. Reg. at 74456 (Members Philip A. Miscimarra and Harry I. Johnson III dissent) ("Given our colleagues' relentless focus on conducting elections as soon as possible…it is irrational and self-defeating to retain the blocking charge doctrine, which prevents many elections from taking place *for years*." [emphasis in original]); *G.F. Paterson Foods*, Case No. 22-RD-210352, fn 1 (January 19, 2018) ("an employee's petition for an election should generally not be dismissed or held in abeyance based on contested and unproven allegations of unfair labor practice."); *Westrock Services, Inc.*, Case No. 10-RD-195447 (October 27, 2017) and *ADT Security Services*, Case No. 18-RD-206831 (December 20, 2017).

Irrespective of the status or results of the pending regulations, this case exemplifies how the blocking charge policy must be rejected as conflicting with the purposes and letter of the Act by depriving employees of their most fundamental right under the Act – the right to choose under Section 9.

Here, at the time of this filing, **the Union has successfully deprived employees of their rights for 445 days.**

Worse yet, despite 10 days of Hearing, neither the Union nor the General Counsel presented any credible evidence that Athens in any way unlawfully encouraged or supported the decertification petitions or majority disaffection. Rather, it was clear the Blocking Charges were just an improper tactic to block employees from exercising their most fundamental rights.

Accordingly, the time has come to effectuate the purposes of the Act and abolish the blocking charge policy. The ALJ should exercise his inherent equitable authority under the Act and dismiss the Complaint and each of its allegations in their entirety both based on the evidence and authority presented herein and as objurgation of the Union's improper manipulation of Board processes.

VII. CONCLUSION.

For the reasons delineated above, the credible evidence and applicable law make it clear that the General Counsel failed to meet their burden to establish any violation of the Act. Therefore, Respondent respectfully asks the ALJ to dismiss each alleged violation of the Act and the Complaint in its entirety.

Dated: September 23, 2019

EPSTEIN BECKER & GREEN, P.C.

By: */s/ Adam C. Abrahms*

Adam C. Abrahms
Christina C. Rentz
Brock Olson

Attorneys for Respondent
ARAKELIAN ENTERPRISES, INC., d/b/a
ATHENS SERVICES

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My business address is 1925 Century Park East, Suite 500, Los Angeles, CA 90067-2506.

3. I served copies of the following documents *(specify the title of each document served)*:

RESPONDENT'S POST-HEARING BRIEF

4. I served the documents listed above in item 3 on the following persons at the addresses listed:

Amanda W. Laufer **Christina Flack** **National Labor Relations Board, Region 31** **11500 W. Olympic Blvd., Ste. 600** **Los Angeles, CA 90064** **T: (310) 307-7337 | F: (310) 235-7420** **E: Amanda.Laufer@nlrb.gov** **Christine.Flack@nlrb.gov** **Steven.Wyllie@nlrb.gov** **Jorge.Romero@nlrb.gov**	***Counsel for the General Counsel***
Paul L. More **David Barber** **Attorneys at Law** **McCracken, Stemerman & Holsberry LLP** **595 Market Street, Suite 800** **San Francisco, CA 94105** **E: pmore@msh.law** **dbarber@msh.law**	***Counsel for the International Brotherhood of Teamsters, Local 396***

☒ **By e-mail or electronic transmission.** I caused the documents to be sent on the date shown below to the e-mail addresses of the persons listed in item 4. I did not receive within a reasonable time after the transmission any electronic message or other indication that the transmission was unsuccessful.

I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at Los Angeles, California.

6. I served the documents by the means described in item 5 on **September 23, 2019**.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

9/23/19	Stephanie Alvarez	*/s/ Stephanie Alvarez*
DATE	(TYPE OR PRINT NAME)	(SIGNATURE OF DECLARANT)

EXHIBIT 5

From: Pierce, Danielle M. <Danielle.Pierce@nlrb.gov>
Sent: Thursday, January 16, 2020 3:59 PM
To: Julio Porres; Paul More; Adam C. Abrahms; David Barber; johnblopez94@gmail.com; pde667@hotmail.com; Christina Rentz; Kat Paterno
Cc: Wren, Nayla
Subject: RE: Arakelian Enterprises, Inc. d/b/a Athens Services, Cases 31-RD-223309, 31-RD-223318, and 31-RD-223335

Dear Parties—

As you all know, the petitions are currently blocked pursuant to the Board's extant blocking policy. Previously, the Regional Director determined that conduct alleged in these cases, if proven, would interfere with employee free choice in an election. Although she had determined that free choice would be impaired by the existence of unremedied unfair labor practices at each of the facilities, she recognizes that it is appropriate to re-assess that determination in light of the ALJ's decision and will do so after the parties have had the opportunity to file exceptions to that decision. She does appreciate the concerns about a lengthy blocking period, which is why we have set the due date for your position statements in advance of the exceptions deadline. We plan to make our decision about whether to continue to block the petitions as quickly as possible after that deadline, so as not to cause undue delay in the event we do decide to unblock. The short extension to February 7 for all parties to provide their positions will not impact our ability to make a timely decision after the exceptions date. Moreover, the setting of deadlines for "informal" position statements (i.e. not the formal Statement of Position required by the Board's Rules and Regulations upon the filing of a petition) during the investigation of a petition or charge is entirely within the discretion of the Region and is generally done without prior consultation with the parties.

We appreciate everyone's concerns, and we expect to provide clarity about the next steps in each case in mid-February after the due date for the filing of exceptions. Thank you all for your cooperation. If you have any questions about how to file your position statement, please direct them to Ms. Wren.

Thank you,

Danielle Pierce
Supervisory Field Examiner
National Labor Relations Board, Region 31
11500 West Olympic Blvd., Suite 600
Los Angeles, CA 90064
P. 310.307.7302
F. 310.235.7420
danielle.pierce@nlrb.gov

From: Julio Porres <porresjulio73@gmail.com>
Sent: T ry 16, 2020 2:55 PM
To: Pau e@msh.law>

Cc: Adam C. Abrahms <AAbrahms@ebglaw.com>; Wren, Nayla <Nayla.Wren@nlrb.gov>; Pierce, Danielle M. <Danielle.Pierce@nlrb.gov>; johnblopez94@gmail.com; pde667@hotmail.com; Christina Rentz <CRentz@ebglaw.com>; Kat Paterno <KPaterno@ebglaw.com>; David Barber <dbarber@msh.law>
Subject: Re: Arakelian Enterprises, Inc. d/b/a Athens Services, Cases 31-RD-223309, 31-RD-223318, and 31-RD-223335

With all due respect to all parties involved, all of us here employeed at Athens want to see this come to a conclusion as soon as possible, we don't want to see anymore delays please let us have a fair vote.

Sincerely
Julio Porres

On Thu, Jan 16, 2020, 2:35 PM Paul More <pmore@msh.law> wrote:

The Region understood that there is a connection between the exceptions that will be filed on the ALJ's decision and position statements on the petitions' treatment. That's why the Region set the date for January 28 originally. The deadline for the extensions has changed to February 14, making it reasonable to extend the deadline for providing position statements to the Region.

The Union's position is that February 15 is the logical date for providing the position statements. The Region's decision to extend the deadline only to February 7 is regrettable, but the Union will file its position statement by that date. The Union disagrees with the Employer's overheated rhetoric.

Paul L. More

McCracken, Stemerman & Holsberry LLP

595 Market Street, Suite 800

San Francisco, CA 94105

Tel.: 415-597-7200

Fax: 415-597-7201

1630 S. Commerce Street, Suite A-1

Las Vegas, NV 89102

Tel.: 702-386-5107

Fax: 702-386-9848

www.

From: Adam C. Abrahms [mailto:AAbrahms@ebglaw.com]
Sent: Thursday, January 16, 2020 2:30 PM
To: Wren, Nayla <Nayla.Wren@nlrb.gov>; Paul More <pmore@msh.law>; Pierce, Danielle M. <Danielle.Pierce@nlrb.gov>; johnblopez94@gmail.com; pde667@hotmail.com; porresjulio73@gmail.com; Christina Rentz <CRentz@ebglaw.com>; Kat Paterno <KPaterno@ebglaw.com>; David Barber <dbarber@msh.law>
Subject: RE: Arakelian Enterprises, Inc. d/b/a Athens Services, Cases 31-RD-223309, 31-RD-223318, and 31-RD-223335

Nayla –

First I view this response entirely inappropriate as neither the Union or the Region sought our position on this additional extension or delay before the snap response.

Please review my last email and confirm that this is still the Region's position as we will likely be taking this as a determination under the Regulations to continue the block for a full 6 weeks after the ALJ's decision.

Thank you,

Adam

Adam C. Abrahms | Bio
t 310.5 0.943.3367
AAbral...ms@ebglaw.com

1925 Century Park East
Suite 500 | Los Angeles, CA 90067-2506
t 310.556.8861 | www.ebglaw.com
Management Memo Blog

From: Wren, Nayla <Nayla.Wren@nlrb.gov>
Sent: Thursday, January 16, 2020 1:51 PM
To: Paul More <pmore@msh.law>; Pierce, Danielle M. <Danielle.Pierce@nlrb.gov>; johnblopez94@gmail.com; pde667@hotmail.com; porresjulio73@gmail.com; Adam C. Abrahms <AAbrahms@ebglaw.com>; Christina Rentz <CRentz@ebglaw.com>; Kat Paterno <KPaterno@ebglaw.com>; David Barber <dbarber@msh.law>
Subject: RE: Arakelian Enterprises, Inc. d/b/a Athens Services, Cases 31-RD-223309, 31-RD-223318, and 31-RD-223335 [IWOV-Legal.FID334306]

Good Afternoon,

The Region has received a request for an extension of time to submit position statements on the pending petitions. The Region hopes to be in a position to made our decision on the petitions promptly after the due date for exceptions. We also require sufficient time to fully consider the positions of all parties. Because of this, we are only able to extend the deadline until **February 7, 2020.**

Please have all position statements e-filed with the Region by close of business on February 7, 2020.

Thank you,

Nayla Wren

Field Attorney

Region 31, NLRB

310-307-7311

From: Paul More <pmore@msh.law>
Sent: Thursday, January 16, 2020 11:25 AM
To: Pierce, Danielle M. <Danielle.Pierce@nlrb.gov>; johnblopez94@gmail.com; pde667@hotmail.com; porresjulio73@gmail.com; Adam C. Abrahms <AAbrahms@ebglaw.com>; Christina Rentz <CRentz@ebglaw.com>; Kat Paterno <KPaterno@ebglaw.com>; David Barber <dbarber@msh.law>
Cc: Wren, Nayla <Nayla.Wren@nlrb.gov>
Subject: RE: Arakelian Enterprises, Inc. d/b/a Athens Services, Cases 31-RD-223309, 31-RD-223318, and 31-RD-223335 [IWOV-Legal.FID334306]

Dear Ms. Pierce,

On January 14, upon request from the Office of the General Counsel, the Office of the Executive Secretary extended the deadline for filing exceptions to Judge Wedekind's decision. I have attached a copy of the notice extending the deadline. The extension applies to all parties.

In light of this extension, we respectfully request that the deadline for the position statement on the pending petitions be extended until the day after the new date to file exceptions, or February 15. This will allow all parties to include the most up-to-date information about the case into their position statements.

Thank you for your consideration.

Paul L. More

McCracken, Stemerman & Holsberry LLP

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1630 S. Commerce Street, Suite A-1

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Fax: 702-386-9848

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From: Pierce, Danielle M. [mailto:Danielle.Pierce@nlrb.gov]
Sent: Tuesday, January 14, 2020 3:43 PM
To: johnblopez94@gmail.com; pde667@hotmail.com; porresjulio73@gmail.com; Adam C. Abrahms <AAbrahms@ebglaw.com>; Christina Rentz <CRentz@ebglaw.com>; Kat Paterno <KPaterno@ebglaw.com>; David Barber <dbarber@msh.law>; Paul More <pmore@msh.law>
Cc: Wren, Nayla <Nayla.Wren@nlrb.gov>
Subject: Arakelian Enterprises, Inc. d/b/a Athens Services, Cases 31-RD-223309, 31-RD-223318, and 31-RD-223335

Dear Parties,

In light of Judge Wedekind's recent decision in Arakelian Enterprises, Inc. d/b/a Athens Services, Cases 31-CA-223801, et al., and the Employer's request that we unblock the decertification petitions, which are currently blocked by the unfair labor practice charges considered by the ALJ, the Region is considering the most appropriate way to proceed. The Region will determine the best course of action in the decertification cases as soon as practicable after the deadline to file exceptions to the ALJ's decision with the Board. In the meantime, we would like the parties' positions as to the appropriate course of action with respect to the petitions at each of the three facilities—Torrance (31-RD-223318), Pacoima (31-RD-223309), and Sun Valley (31-RD-223335). Specifically, for each petition please address whether it is appropriate to (1) continue blocking; (2) unblock the petition, proceed to an election, and impound the ballots pending the outcome of the unfair labor practice charge if it goes to the Board on exceptions; (3) unblock the petition entirely and proceed to an election and tally of ballots; or (4) take some other course of action. Please keep in mind the Region has already considered the impact of the complaint allegations in cases 31-CA-223801, et al. and determined that they do not require dismissal of the decertification petitions, so that would not be a reasonable suggestion.

So that we may promptly take the appropriate actions upon the deadline for the filing of exceptions, we would like your p advance of that date, no later than **January 28, 2020**. The Board Agent currently assigned to this case is Field Attorney Nayla Wren, who can be reached at Nayla.wren@nlrb.gov or at (310) 307-7311. You may contact

her with any questions about the decertification petitions. Thank you very much for your continued cooperation in this matter.

Thank you,

Danielle Pierce

Supervisory Field Examiner

National Labor Relations Board, Region 31

11500 West Olympic Blvd., Suite 600

Los Angeles, CA 90064

P. 310.307.7302

F. 310.235.7420

danielle.pierce@nlrb.gov
